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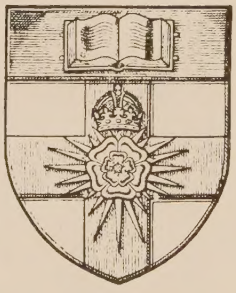

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AND

Ecclesiastical Courts.

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THE ECCLESIASTICAL COURTS,

XXXVI—XXXVIII VICTORIA.

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CASES

DETERMINED BY THE

HIGH COURT OF ADMIRALTY

AND BY THE

ECCLESIASTICAL COURTS,

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

THE ELPIS. (6161.)

1872
Dec 11.

Bottomree—Merger of Claim for Necessaries in Bottomree Bond—Jurisdiction of Court of Admiralty in a Cause transferred from a County Court—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3–8.

4 PD 21

A suit for necessaries was instituted in the Swansea County Court against the owners, unknown, of a foreign brig, which was, at the time of the institution of the suit, at Swansea. The suit was afterwards transferred to this court, and the plaintiffs filed their petition. It appeared from the petition that the claim of the plaintiffs was for money advanced by them to execute necessary repairs to the brig at a British port, and that the money was advanced on the security of an instrument, by which the master of the brig pledged himself and vessel, and her owners, for the repayment of the money, except in case of the total loss of the vessel on her intended voyage:—

Held, 1. That the claim set forth by the petition was founded on bottomree; that the county court had no jurisdiction to entertain such a claim, and that as the cause was transferred to this court from the county court, this Court had no jurisdiction to entertain the suit. 2. That it was not competent to the plaintiffs, upon the facts stated in the petition, to waive the instrument of bottomree and insist on their claim for necessaries, because the claim for necessaries must be considered to be merged in the instrument of bottomree.

In the year 1872, a suit for necessaries was instituted in the Swansea County Court, in pursuance of the provisions of the

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County Court Admiralty Jurisdiction Act, 1868, on behalf of Luigi Descalzo and Vittorio Brosinovich, against the owner or owners unknown of the foreign brig *Elpis*, which was then at Swansea. The plaintiffs found it necessary, in order to establish their case, to procure evidence from abroad, and the County Court having no power to issue a commission for the examination of witnesses abroad, the cause was transferred to this court by an order of the County Court made in pursuance of the power granted by the 8th section of the County Court Admiralty Jurisdiction Act, 1868.

The following petition was filed on behalf of the plaintiffs:

1. The above-named brig *Elpis* belongs to the port of Syra in Greece. In the year 1869, she was called by the name of *Carlos Primos*, and was lying in the River Tyne, bound for Syra, and required certain necessary repairs to enable her to prosecute her voyage from Newcastle to Syra.

2. Vassiglios Colucoridis, the master of the said brig, being without funds and credit at Newcastle, and being unable to obtain money to enable him to get the said repairs executed, and to pay the expenses necessary to be incurred to enable the said brig to prosecute her said voyage, applied to the said Messrs. Descalzo, Brosinovitch, & Co., of North Shields, the plaintiffs in this suit, for the loan of 35*l.* sterling, which sum they lent to him to enable him to get the repairs executed and to pay the said expenses upon the security of the following instrument, which was duly executed by the master of the said vessel.

"North Shields,

"20th Sept., 1869.

"35*l.*

"Except in case of the total loss of my vessel, the *Carlos Primos* of Syra, on her now intended voyage from Newcastle to Syra, I promise to pay, seven days after arrival there, to the order of Messrs. Descalzo, Brosinovich, & Co., this first of exchange (second and third unpaid), the sum of 35*l.* sterling at the course of exchange as endorsed in London, value received in disbursements for the use and on account of my vessel, *Carlos Primos*, and owners, and I hereby pledge myself, and vessel, and owners, for the payment of the above sum in the manner aforesaid.

"(Signed) "Vassiglios Colucoridis."

3. In consequence of the said advance of money, the said brig was enabled to proceed on her said voyage, and arrived safely in the port of Syra, and seven days after her arrival there default was made in payment of the said instrument, which remains, and still is wholly due and unpaid.

The petition concluded with the following prayer:

"The solicitors for the plaintiffs pray the right honourable the judge, to pronounce that the said sum of 35*l.* is due, and to condemn the defendants in that sum, with the interest already due, and to grow due thereon, to the day of payment, and also in the costs of the suit, and that otherwise right and justice may be administered to the plaintiffs in the premises."

E. C. Clarkson moved to reject the petition.

1. The petition in form does not comply with the rules of the court, because it does not state the nature of the cause. It is described as a cause simply; it should be described as a cause of necessaries or as a cause of bottomree.

2. It appears from the petition that the cause is a cause of bottomree. It is clear from the instrument set out in the petition that sea risk was comtemplated, and this is the essential ingredient of bottomree: *The Indomitable.* (1) That if this is a cause of bottomree this Court has no jurisdiction to entertain it. The cause is a county court cause transferred to this court, and this Court has no more jurisdiction in the cause than the county court had. It is clear that the county court had no jurisdiction in a cause of bottomree (The County Court Admiralty Jurisdiction Act, 1868, s. 3), and if the facts alleged in the petition had appeared in the county court, the county court must have dismissed the cause for want of jurisdiction.

3. There is nothing in the petition to make it appear that the defendants, the owners of the ship, are liable for the money claimed. The petition does not show any personal liability on the part of the defendants; it does not state that they were the owners of the ship at the time, and although there may be a lien on the ship, that lien can only be enforced by proceedings in rem. The present suit is a proceeding in personam.

(1) Swa. 446.

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THE ELPIS.

G. Bruce in support of the petition.

1. There is no rule of court requiring that the nature of the cause should be stated in the petition. It matters not by what name a cause is called, so long as the nature of the claim appears from the facts stated in the petition.

[SIR ROBERT PHILLIMORE: You may address your argument to the other points.]

2. Although it must be admitted that a county court has no jurisdiction to entertain a suit of bottomree, yet, when a cause is transferred from a county court to this court, this Court may exercise its full jurisdiction over all matters that are involved in the cause. One great object of the clauses in the Act enabling suits instituted in the county court to be transferred to this court is to prevent a failure of justice by providing means for bringing within the reach of the extended jurisdiction of this Court suits in which the county court, by reason of its limited jurisdiction, is unable properly to determine the rights of the parties. But even if it should be held that this Court has in this cause no greater jurisdiction than the county court, it may still entertain the claim of the plaintiffs. The plaintiffs have a claim for necessaries independently of the instrument set out in the petition The holder of a bottomree bond, granted to secure a loan advanced for necessaries, is not bound to rest his claim upon the bond: he may waive the bond and claim for the necessaries independently of the bond. The doctrine of merger is a technical doctrine of the Common Law, applicable to instruments under seal and has no application in such a case as the present. It is a common thing to take the double security of bills of exchange and a bottomree bond for money advanced for the necessities of a ship, but it has never been suggested that the right of action on the bills of exchange is merged in the bond: *The Nelson.* (2) Moreover it is quite consistent with the petition that circumstances essential to the validity of a bottomree transaction, such as communication with the owners, are wanting in the present case, so that, after all, when the facts come to be inquired into, it may be found that the instrument set out in the petition is a void instrument.

(2) 1 Hagg. Ad. 169–179. But see *Bray* v. *Bates:* 9 Met. American Rep. 237.

[SIR ROBERT PHILLIMORE. Could not the plaintiffs amend their petition by striking out of the second paragraph all reference to the instrument?]

An amendment of the petition cannot alter the fact that the instrument in question was given.

3. The present suit is a proceeding in rem in the sense in which that term is used in this court. The form of summons which was issued in this case is the only form by which a suit in rem can be instituted in the county court. It appears from the proceedings that bail has been given, and the process must have been served upon the vessel.

E. C. Clarkson, in reply. The claim for necessaries must be considered as having merged in the bond, because it is clear that the right of the plaintiffs to sue for necessaries would have been lost if the ship had not arrived safely.

SIR ROBERT PHILLIMORE. I have entertained very considerable doubt in the course of the argument as to the course I should pursue in this case, but upon the whole I am inclined to think that my decision must be adverse to the petitioner. The case which was transferred to this court under the authority of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71. s. 8) is a cause of necessaries instituted on behalf of the plaintiffs, "Messrs. Luigi Descalzo and Vittorio Brosinovich" against "the owner or owners unknown of the brig *Elpis*." This being a cause of necessaries, the claim disclosed on the petition of the plaintiffs filed in this court is founded on bottomree.

The second article of the petition set out an instrument which is as follows: [The learned judge here read the instrument.] Now it is clear to me that this is in substance and effect a bottomree bond, and looking to the precedents in this court, it must be so considered. There is great force in the observation of Mr. Clarkson that the rule of merger must be applied in this case because it is admitted that the simple contract debt for necessaries could not exist in case of the ship not reaching her destination; and therefore the only contract which the plaintiffs could enforce was a contract arising out of a bottomree bond. It is quite clear that the petition cannot be sustained, and although I am very reluctant in a question

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involving so small a sum to put the parties to further expense, I must not only refuse to allow the petition to be amended as I suggested to Mr. Bruce in the course of the argument, but I think I must reject the petition, leaving the plaintiffs hereafter to take such steps as they may be advised. I also must reject the petition with costs. I shall not interfere with the suit further than by rejecting the petition.

Solicitors for plaintiffs: *Hillyer, Fenwick, & Stibbard.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

1873

Jan. 21.

THE ROSE. (6352.)

Possession—Mortgage—Jurisdiction to decide as to the Title to a Ship—3 & 4 *Vict. c.* 65, *ss.* 3 & 4—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 11.

A British ship was mortgaged by an instrument that was in the form prescribed by the Merchant Shipping Act, 1854, and was duly registered. The mortgagor died intestate, and the mortgagees sold the ship under their power of sale, and executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mortgage money was indorsed on the mortgage and signed by the mortgagee, and produced to the registrar of shipping, who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mortgagor.

In order to complete the title of the purchaser a suit in rem was instituted on behalf of the mortgagee and purchaser, and in such suit the Court held it had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship.

THIS was a cause instituted on behalf of Christopher Dove Barker and William Winship against the ship *Rose*. The ship was arrested, but no appearance was entered. The petition filed on behalf of the plaintiffs was in substance as follows:—

1. Before and at the time of the execution of the mortgage security hereinafter mentioned, Thomas Gibson was the sole owner of the British ship *Rose*, belonging to the port of North Shields.

2. In October, 1867, the said Thomas Gibson, being indebted to Messrs. Woods & Co., of Newcastle-upon-Tyne, bankers, in the sum of 1000*l.*, it was agreed by and between the said Thomas Gibson and the said Messrs. Woods & Co., that the said Thomas Gibson should execute a mortgage of the said ship to Christopher Dove Barker, one of the plaintiffs in this cause, and one of the partners in the said firm of Woods & Co., as security for the repayment of the

sum of 1000*l.*, and such further advances as might be made by the said Messrs. Woods to the said Thomas Gibson.

3. Accordingly on the 3rd day of October, 1867, the said ship was mortgaged to the said Christopher Dove Barker to secure the repayment to the said Christopher Dove Barker of the sum of 1000*l.*, and such further advances as aforesaid, together with interest thereon, to be paid at the rate and in the manner therein mentioned.

4. The said mortgage was duly registered at the port of North Shields, on the 7th day of October, 1867.

5. The said Thomas Gibson died in June, 1872, and at the time of his death there remained due and owing on the said mortgage security the principal sum of 1000*l.*, together with a large sum for further advances and interest.

6. The said Christopher Dove Barker being unable to obtain payment of the principal money and interest so due as last aforesaid, in the month of July, 1872, sold the said ship, under the power of sale contained in the mortgage deed, to William Winship, one of the plaintiffs in this cause, for the sum of 800*l.*

7. On or about the 20th day of July, 1872, the said William Winship paid to the said Christopher Dove Barker the said sum of 800*l.*, and the said Christopher Dove Barker, by the direction of the said Messrs. Woods & Co., executed a bill of sale of the said ship to the said William Winship.

8. On the 24th day of July, 1872, the said William Winship signed a declaration, such as is required by the 50th section of the Merchant Shipping Act, 1854—the said declaration is true, and the said William Winship has always been ready to declare to the truth of the same in the manner by law required.

9. The said William Winship believing that in order to complete his title to the said ship it was necessary that a discharge of the said mortgage should be indorsed on the back of the original mortgage and signed by the said Christopher Dove Barker, requested him to make such endorsement and sign the same.

10. Accordingly the said Christopher Dove Barker, in pursuance of such request as aforesaid, indorsed and signed the said discharge on the back of the said mortgage on the 20th day of July, 1872, and the said mortgage was given by the said Messrs. Woods & Co. to one of their clerks.

11. The said clerk by mistake took the said mortgage to the Custom House at North Shields on the 27th day of July, 1872, and produced the same to the registrar, who recorded the said discharge.

12. The said William Winship afterwards presented the said bill of sale and declaration mentioned in the seventh and eighth article of this petition to the registrar at the Custom House at North Shields, and requested him to register the said bill of sale, but the said registrar refused to register the said bill of sale, upon the ground that the property in the said ship had passed to the representatives of the said Thomas Gibson.

13. The said Thomas Gibson died intestate and insolvent, and no administration of his estate and effects has been taken out.

14. The execution and registration of the said discharge were acts done by mistake, and the said discharge is wholly void at law and in equity.

15. The said William Winship is entitled to be registered as the legal owner of his said ship, but owing to the said mistake he is unable to be registered as the legal owner without the assistance of this Honourable Court.

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The petition concluded with the following prayer:—The solicitors for the plaintiffs pray the Right Hon. the Judge to pronounce the said William Winship to be the lawful owner of sixty-four sixty-fourth shares of and in the said ship *Rose*, and to decree that possession of the said ship, her tackle, apparel, and furniture, be given to the said William Winship as such lawful owner, and that all things may be done to complete his title to the said ship, and that otherwise right and justice may be administered in the premises.

It appeared from copies annexed as exhibits to the petition, that the mortgage deed, the bill of sale, and the declaration above-mentioned, were drawn up according to the forms prescribed and approved by the Merchant Shipping Act, 1854, and that the discharge indorsed on the mortgage deed was so far as material in the following terms:—

"Received the sum of 800*l.* in discharge of the within written security, dated at Harrogate this 26th day of July, 1872."

The allegations in the petition were proved by affidavits, and it was stated on affidavit that notice of the institution of the suit had been served by the solicitors for the plaintiffs on the next of kin of the mortgagor.

G. Bruce, for the plaintiffs. The Court has jurisdiction to grant the prayer of the petition. The 3 & 4 Vict. c. 65 (ss. 3 & 4) confers upon the Court authority to decide all questions as to the title to any ship, and by the 11th section of the Admiralty Court Act, 1861, the Court is enabled to exercise jurisdiction over any claim in respect of a mortgage duly registered.

[SIR ROBERT PHILLIMORE. Ought not administration to have been taken out to the estate of the mortgagor?]

The very object of this suit is to avoid the expense and trouble of an administration. The discharge indorsed on the mortgage was a mistake and altogether void. If administration of the estate of the mortgagor were taken out it is clear that his representatives could not, on the facts now before the Court, substantiate any claim to the ship. The next of kin of the mortgagor has had notice of this suit, and has not appeared.

SIR ROBERT PHILLIMORE. This is a novel exercise of jurisdic-

tion on the part of this Court, but after giving careful attention to the statutes cited, I am of opinion that the Court has jurisdiction, and that the plaintiffs are entitled to a decree in the terms of their prayer. I shall make an order accordingly. (1)

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THE ROSE.

Solicitors for plaintiffs: *Deacon, Son, & Rogers.*

THE ANNETTE. (6303.)

Feb. 11.

Practice—Appeal from Cinque Port Commissioners—Salvage—Tender—1 & 2 Geo. 4, c. 76.

The sum of 800*l.* had been awarded by the Cinque Port Commissioners to salvors for services rendered to a brig and her cargo. The owners of the brig and cargo, pursuant to 1 & 2 Geo. 4, c. 76, instituted an appeal against this award in the Court of Admiralty, and afterwards tendered by act in Court the sum of 100*l.*:—

Held, on motion to direct the notice of tender to be taken off the file, that the appellants were entitled to make such tender by act in Court, notwithstanding that no tender had been made prior to the institution of the appeal.

THIS was an appeal from an award of the Cinque Port Commissioners in a case of salvage. The commissioners awarded 800*l.* to the master and crew of the lugger *Victoria* in respect of services rendered to the brig *Annette* and her cargo. The owners of the brig instituted in this Court an appeal against this award, and tendered by act in Court the sum of 100*l.*, together with costs. No tender had been made prior to the institution of the appeal. The notice of tender was in the following form: "Take notice, that we have this day paid into the Bank of England to the credit of the Registrar of the High Court of Admiralty in this cause the sum of 100*l.*, which sum we hereby tender to your parties for their services proceeded for in this cause, together with costs due by law, meaning thereby taxed costs in this cause." On the 21st of January the appellants moved the judge in chambers to order the

(1) The decree was drawn up in the following form:—"The judge having heard counsel on behalf of the plaintiffs pronounced William Winship, of Blyth, in the county of Northumberland, shipowner, one of the said plaintiffs, to be the lawful owner of sixty-four sixty-fourth shares of the ship or vessel *Rose* (official number 24,639) and entitled to be registered as the sole owner thereof, and he decreed possession of the said ship or vessel to be delivered to him the said William Winship accordingly."

1873

THE ANNETTE.

respondents to accept or reject the tender. On this motion the judge made no order.

28th Jan. 1873. *E. C. Clarkson*, on behalf of the respondents, moved the Court to direct that the notice of tender of the appellants be taken off the file of proceedings in this cause. This is an appeal against the decision of a Court of competent jurisdiction, and it is not open to the appellants to make a tender for the first time after the institution of the appeal. The respondents are entitled to support the judgment of the Court below without being exposed to the risk of being burthened with the costs of the proceedings on appeal. How can the Court on appeal try the question of the sufficiency of a tender which is not made in the Court below?

W. G. F. Phillimore, contrà. It may be that such a tender could not be made on an appeal from magistrates or from a county court judge. But the practice on appeals from the Cinque Port Commissioners is altogether different: *The Generous* (1); *The Caledonia.* (2) An appeal from the Cinque Port Commissioners is a proceeding in the nature of a re-hearing; and as the proceedings below do not admit of a tender being made, there can be no reason why the respondents should not, on the appeal being instituted in this Court, tender such sum as they admit to be due. If the tender is not admitted the respondents may possibly not be condemned in costs, even in the event of the award being reduced to an amount below that which they are willing to admit to be due. It appears, moreover, from the case of *The Lord Goderich*, cited in Pritchard's Adm. Digest, p. 107, n, that there is actual authority for the course pursued by the appellants.

James P. Aspinall, amicus curiæ, referred to the report of the same case: 10 Monthly Law Magazine (1841), Notes of Cases, p. 217.

E. C. Clarkson, in reply.

Cur. adv. vult.

Feb. 11. SIR ROBERT PHILLIMORE. A not unimportant question of practice has been raised in this case, both in chambers and

(1) Law Rep. 2 A. & E. 57. (2) See note, post, p. 11.

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THE ANNETTE.

in Court, before me, namely, whether in an appeal from the salvage commissioners a tender not made before them can on appeal be made in this Court. The case of *The Lord Goderich* (1), to which Mr. Aspinall, junior, as amicus curiæ, was so good as to refer the Court, seems to shew that Dr. Lushington allowed such a tender to be made. I have looked at some other cases on the same subject reported a long time ago in the Monthly Law Magazine during the interval in which the regular reports of the Court were for a time suspended. It appears, therefore, that there is a precedent for such a tender, and on principle it is not objectionable—the object of making a tender is to affect the decision as to costs; the respondents are in possession of the judgment of the Court below, and have a right if they please to rely entirely upon it. On the other hand, the appellants are entitled to contend that the Court below has erred, not in awarding salvage at all, but in the amount of the award, and to tender as a corrective of its judgment a smaller amount. The appellate Court, if it should be of opinion that the lesser sum is sufficient, may consider that the rejected proposal should affect the question of costs in the case before it.

I, therefore, shall allow the tender to remain on the file, and in future where a tender is made on an appeal from the salvage commissioners I shall—overruling my decision in chambers—require the tender to be accepted or rejected; but in the present case I shall give no costs.

Proctors for appellants: *Dyke & Stokes.*

Solicitors for respondents: *Lowless, Nelson, & Jones.*

THE CALEDONIA.

This was an appeal instituted on the 28th of January, 1869, on behalf of the owners and crew of the lugger *Seaman's Glory* from an award of salvage made by the Cinque Port Commissioners at Ramsgate. The commissioners had awarded 130*l.* to the appellants for salvage services rendered by them to the barque *Caledonia*. It appeared from the certificate of the commissioners that the parties when before the commissioners had agreed that the value of the *Caledonia*, her cargo and freight, was 6370*l.* The appellants on the 13th of February, 1869,

(1) 10 Monthly Law Mag. Notes of Cases 217.

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THE CALEDONIA.

filed a petition, which set forth at length the facts relied on in support of their claim. The 17th article of the petition was as follows:—

17. The aggregate values of the *Caledonia*, her cargo, and freight, at the time of the aforesaid services were represented by the owners thereof or their agents to be the sum of 6370*l.*, and upon such representation the values thereof were agreed before the said commissioners at the sum of 6370*l.*, but they largely exceeded that sum.

The respondents, however, objected to pleadings being entered into, and on the 23rd of February, 1869, the two following motions came on to be heard in Court. (1.) A motion on behalf of the appellants for leave to file their petition and go into evidence. (2.) A motion on behalf of the respondents praying that in the event of leave being given to the appellants to file the petition, the Court would direct the 17th article to be struck out. In support of the first motion an affidavit made by the agent of the appellants was filed. The affidavit, after referring to the copy proceedings before the commissioners, stated "that the facts attending the salvage services of the appellants, and which form the subject of this cause, are not stated in such a full and sufficient manner in the said copy proceedings as to enable this honourable Court properly to determine the amount to be awarded to the said appellants in respect of the said service."

E. C. Clarkson appeared for the appellants.
R. A. Pritchard, for the respondents.

SIR ROBERT PHILLIMORE held that the salvage appeals from the Cinque Port Commissioners under 1 & 2 Geo. 4, c. 76, were different from salvage appeals from magistrates and judges of county courts under the Merchant Shipping Acts, and that the rule laid down in *The Generous* (1) did not apply, and that the Court was bound to admit the petition, and to allow the appellants to re-open the whole case, and, if they wished it, to adduce fresh evidence; but that if fresh evidence were adduced, it would be, in the language of the decision in *The Thomas Hood* (2), at the imminent peril of costs, if such further evidence should ultimately appear to the Court to have been introduced without sufficient cause.

On the 13th of April, 1869, the pleadings being concluded, the judge directed the evidence to be taken orally in Court, with leave however to both sides to file affidavits, subject to rule 81 of the Court.

On the 8th day of June, 1869, the cause came on for hearing, and witnesses were examined viva voce.

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *E. C. Clarkson* were for the appellants.

Butt, Q.C., and *Pritchard*, were for the respondents. At the hearing a further objection was taken on the part of the respondents to the appellants being allowed to adduce any fresh evidence, unless it was noviter perventum; but the Court held that any evidence material to the matters in issue was admissible, and that the point had already been decided on the previous motions.

Solicitors for appellants: *Lowless & Nelson.*
Proctors for defendants: *Pritchard & Sons.*

(1) Law Rep. 2 A. & E. 57. (2) 1 W. Rob. 18.

CARGO EX ARGOS. (6008).

1873
March 11.

Contract of Affreightment—Execution of the Contract on the Part of the Shipowner—Inability to deliver Goods arising from the Incapacity of the Goods—Lien for Expenses incurred in preserving Cargo—The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51) *s.* 2.

The defendant shipped on board the steamship of the plaintiff in the port of London a number of barrels of petroleum. A bill of lading was given for the goods: it provided that the goods should be delivered at the port of Havre, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, &c., excepted, unto order or assigns on paying freight. It further provided that the goods should be taken out within twenty-four hours after arrival, or pay a fixed sum per day demurrage, and a note in the margin stated that the goods were subject to a landing charge of 5 per cent. on the amount of freight and primage. The defendant wrote to G., who was the ship's broker at Havre, informing him that the petroleum was to be sent to Rouen, and that he was not to deliver it without production of the bill of lading regularly indorsed, and that the freight and other expenses were to be charged on the goods. The vessel arrived in the harbour at Havre, on the night of the 7th of December, 1870, with the petroleum and other goods on board. Owing to there being at the time a large quantity of war material at Havre, the authorities there would not allow the petroleum to be landed, and would not allow the vessel to remain in the harbour with the petroleum on board. On the morning of the 7th of December the vessel sailed from Havre and proceeded to Honfleur and Trouville, but the authorities at those ports refusing to allow the petroleum to be landed, the vessel returned to Havre on the 12th of December, and in the outer harbour there transhipped the petroleum into a lighter hired on behalf of G. to receive it. The vessel then went into dock, and having discharged the rest of her cargo and shipped a fresh cargo for London, she was obliged by the authorities at Havre to re-ship the petroleum. On the 16th of December she sailed from Havre, and in due course she arrived at the port of London with the petroleum on board. G. was well aware of the various movements of the vessel. The bill of lading for the petroleum was not presented at Havre or elsewhere. The defendant had notice of the petroleum being brought back to London, but he did not take delivery of it. The plaintiff instituted a suit in rem against the petroleum:—

Held, that the plaintiff was entitled to recover in such suit the bill of lading freight, and the expenses and demurrage incurred in respect of the petroleum at Havre, Honfleur, and Trouville, and freight for the carriage of the petroleum from Havre to London.

Semble, that there was an entire execution of the contract on the part of the plaintiff.

But even if there was not such entire execution, still he was entitled to recover the bill of lading freight, because there was such an execution of the contract as he could effect consistently with the incapacity of the cargo.

Where a master of a ship, in order to preserve cargo, takes measures such as a

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CARGO EX ARGOS.

wise and prudent man would think most conducive to the benefit of all concerned, the cargo is subject to a lien for the expenses so incurred, and this lien may be enforced by a suit in rem, by virtue of the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869.

Affirmed 5 C.P.D. 184

THIS was a suit instituted in the City of London Court for freight, demurrage, and expenses, on behalf of Jules Gaudet, owner of the steamship *Argos*, against 147 barrels of petroleum lately shipped on board the steamship *Argos* by W. Horner Brown.

An appearance was entered on behalf of W. Horner Brown. The parties filed in court a statement of agreed facts which was as follows:—

Statement of Agreed Facts.

The plaintiff, who trades under the style of Gaudet Frères, was, in the month of November, 1870, the owner of the British steamer *Argos*, and of other steamers which were frequent traders between London and Havre, and other ports in the north of France.

The defendant, Walter Horner Brown, is a merchant in Billiter Square, dealing in petroleum, oils, chemicals, and other articles, trading as Walter H. Brown and Co., and on the 25th of November he received an order from Messrs. Tuffieré and Prudhon, of Rouen, for 200 barrels of petroleum, to be delivered free on board, in London, and to be sent to Havre as soon as possible.

In consequence of this, the defendant, on the same day, sent his clerk to the plaintiff's London brokers (Messrs. Rowell and Racine) to inquire the freight of petroleum from London to Havre and the probable date of sailing of the next steamer, and was informed the freight would be 15*s.* to 20*s.* per ton, and the steamer would sail about the end of the week. The defendant thereupon arranged to send 147 barrels of petroleum by such steamer, and the same was shipped on board the *Argos* on the 5th of December, and the captain gave the defendant the following bill of lading:—

"Shipped in good order, and well-conditioned, by W. Horner, in and upon the good steamship called the *Argos*, whereof is master for the present voyage, 'Richardson,' and now riding at anchor in the river, and bound for Havre, 147 barrels of petroleum.

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	Cwts.	qrs.	lbs.
The goods to be taken out within twenty-four hours after arrival, or pay 10*l.* 10*s.* a day demurrage - - - -	421	0	9

Freight 21 1 3
Primage 3 3 2
£24 4 5
Exchange f. 25.40

All goods are subject to a landing charge of 5 per cent. on the amount of freight and primage payable au change de f. 25.40.

Being marked and numbered as in the margin, and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of Havre, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, machinery, boilers, steam and steam navigation, of whatever nature or kind soever, excepted, unto order or to their assigns, on paying freight for the said goods at the rate of 20*s.* and 15 per cent. primage per ton gross, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading all of this tenor and date, the one of which bills being accomplished, the others to stand void.

"Dated in London, 30th November, 1870.

"Weight and contents unknown. Not accountable for leakage.

"W. J. Richardson."

The said bill of lading was, by direction of the defendant, made out in the name of W. Horner, his two first names.

Upon the 6th of December, the defendant applied to the plaintiff's brokers for the name of the ship's broker at Havre, and was informed it was M. H. Généstal, Rue d'Orleans, Havre. Defendant thereupon wrote him the following letter, which was duly received by Généstal, but of which the plaintiff had no notice :—

"Monsieur H. Généstal,
"73, Rue d'Orleans,
"Havre.

"11, Billiter Square,
"6th December, 1870.

"We beg to inform you that we have shipped upon the steamship *Argos*,

Washington, 1/147 — 147 barrels of spirit of petroleum, 21,392 kilogrammes,

to order. These spirits are to be sent to Messrs. Tuffieré and Prudhon, at Rouen, and you must not deliver them to any person unless they present the regular bill of lading endorsed by us.

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"The freight and other expenses are to be charged on the goods.

"W. H. Brown & Co.

"Accept, Monsieur, our salutations."

The *Argos* sailed with the petroleum and other goods, being a general cargo, at midnight on the 6th of December, arrived at Havre 10.30 p.m., on the 7th, and, being unable to land the cargo there, the captain proceeded to Honfleur; and being unable to land it there, he took the ship to Trouville, and was informed there he might land it there if he obtained a certificate from the engineer of bridges and ways, resident at Honfleur; and the captain thereupon went to Honfleur, and obtained the following certificate:—

"Honfleur, le 8 Décembre, 1870.

"L'Ingénieur Ordinaire de l'Arrondissement du Nord-Est.

"A Monsieur,—L'Ingénieur soussigné a envoyé le steamer *Argos* à Trouville à cause du danger tout particulier en ce moment qu'offre la présence du pétrole sur les quais à côté du matériel de guerre en chargement pour le Havre. Le soussigné a écrit à ce sujet à M. Dubose une lettre qui lui parviendra demain matin et qui indique les précautions à prendre sous le bénéfice de ces précautions et en installant de suite un garde-feu à bord pour empêcher.

"M. Dubose peut faire entrer le steamer *Argos* en bassin ce soir à la marée.

"E. Arnoux, l'Ingénieur Ord^re.

"Arrondissement du Nord-Est,

"Ponts et Chaussées, Département du Calvados."

The captain, under this authority, took the ship into the basin at Trouville Deauville, where he remained during the 9th, and was on the 10th compelled to go out of the basin; and the president of the Municipal Commission of Trouville Deauville endorsed on the engineer's authority the following certificate:—

"Nous Président de la Commission Municipale de Deauville certifions que nous avons été obligés malgré l'autorisation de monsieur l'Ingénieur d'Honfleur de faire sortir du bassin de Deauville le navire anglais *Argos* chargé de pétrole, la population s'opposant

au déchargement dudit navire et menaçant de se laisser entraîner à des excès. 1873

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" (Sd.) " Hébert Dérocquett,
" Le Président de la Commission Municipale,
" Le Membre Délégué.

" Deauville, 10 Décembre, 1870."

Upon that the captain went to Honfleur, and the following protest was noted before the British consul there, and the statements therein are to be taken as true:—

" Vice-Consulat Britannique à Honfleur.

" By this public instrument of protest, be it known and made manifest unto all whom it doth or may concern, that on the 10th day of December, 1870, before me, British Vice-consul for the port and district of Honfleur, voluntarily came and personally appeared William John Richardson, master of the British steamship or vessel, called the *Argos*, of London, Official No. 60,839, of the burden of 109 tons, or thereabouts, then lying in the port of Trouville-sur-Mer, in the consular district of Honfleur, laden with petroleum, who duly noted and entered his protest with me, the said vice-consul, against all losses and charges he incurred for not being allowed to unload his cargo in the port of destination and two other ports, by the local authorities of these ports, and did declare, depose, and say, that he sailed from London on the 6th of December, present month, at midnight, with a cargo of petroleum, in destination for Havre, where he arrived on the 7th, at 10.30 p.m., having the red flag up on account of having petroleum on board, and that early in the morning of the 8th of December the authorities of the port of Havre compelled him to take the ship out of the harbour, as they would not allow him to remain there, having petroleum on board, and in consequence of which he started immediately, at 10.30 a.m., for Honfleur, where he arrived at 11.30 a.m., and having swung the vessel, and was about to make her fast in a position where the pilot told him, he received an order from the harbour master to leave immediately the port, and therefore he did leave, at noon, for the next nearest port, which was Trouville-sur-Mer, and where he arrived at 1.30 p.m. And the said appearer did further declare, that on arriving at Trouville he found a difficulty for the unloading of the petroleum from the port or harbour

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master, or principal of the port, who informed him that he would allow him to unload the petroleum if he could obtain a permission from the Ingénieur des Ponts and Chaussées, residing at Honfleur; and in order to hasten the despatch he immediately employed a cab, and started himself with the broker, M. Hébert, to Honfleur, and obtained the required permission; and after which he returned to Trouville, and put the ship in dock next day (Friday, the 9th), waiting further instructions. And further, that to-day (Saturday, the 10th), he met with some objection from the part of the president of the municipality administrative commission of Deauville Trouville, for the landing of the casks in question; and after having made further steps in the case before other authorities, he had been ordered to leave the port of Trouville as soon as possible, without landing any of the casks of petroleum, and in consequence of which he went to Honfleur at 3 p.m., in order to deposit, note, and enter his present declaration and protest at this vice-consulate with all reserve, to furnish further particulars if required. And therefore, the said William John Richardson, master, did declare to protest, and by these presents, he does solemnly protest against all and every person or persons whom it doth, shall, or may concern, against all loss of time and charges incurred by the above-mentioned opposals of landing his cargo he met in these three different ports, and doth declare that all damages for delay or detention, and all losses and charges, are and ought to be borne by the merchants and freightors interested, and reserves for himself and his owner all rights against them. And I the said Vice-Consul, at the request of said William John Richardson, master of the said steamship *Argos*, did and do hereby solemnly protest against the same, in the manner and form aforesaid.

"Thus done and protested in the city of Honfleur, at the British Vice-consulate."

On the 9th of December M. Généstal wrote to the defendant as follows:—

"Havre, the 9th December, 1870.

"Messrs. Walter H. Brown and Co.,

"11, Billiter Square, London.

"Your letter of the 6th I have received to-day only.

"For some time the entry into the port of Havre has been re-

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fused to ships carrying petroleum. I have attempted in vain to discharge the 147 barrels at Honfleur, and been compelled to send the *Argos* to Trouville, where I hope to be able to disembark it. Rouen has been occupied by the Germans, and I have not yet heard from Messieurs Tuffieré and Prudhon. If a judicial sequestrator could be obtained at Trouville, he would take care of the goods, and he would only deliver against presentation of a regular endorsed bill of lading, and after payment of the freight, and all other expenses.

" I cannot truly comprehend how the buyers at Rouen should have directed this petroleum to go to Havre, since it has been forbidden in the newspapers to discharge such goods here, and that for more than two months.

" Accept, gentlemen, my sincere salutations.

" H. Généstal."

The plaintiff and defendant were, throughout, personally quite unaware that there was any difficulty in landing petroleum at Havre.

The *Argos* having other cargo in her, Mr. Duprey, on the part of Généstal, hired a lighter, called the *Augustine Amélie*, in order that the petroleum might be transhipped into her in Havre outer harbour, or the roads, while the *Argos* went into dock to unload her other cargo; and the following agreement was entered into:—

" Havre, le 12 Décembre, 1870.

" Entre le Capitaine Ponetre du sloop français *Augustine Amélie* d'une part,

" Et M. Généstal, agent du steamer anglais *Argos*, d'autre part, a été convenu et réglé ce qui suit.

" Le Capitaine Ponetre s'engage à recevoir et garder à son bord jusqu'à Samedi 17 courant 147 fûts essence de pétrole, lesdits fûts à transborder dans l'avant-port ou en rade du Havre à bord du steamer anglais *Argos*.

" Il est bien entendu que le Capitaine Ponetre gardera son navire à disposition, de manière à ce que le transbordement s'opérera sans aucun retard et dès la sortie du pont dudit steamer *Argos*, moyennant quoi il lui sera à titre de frèt à forfait la somme de deux cent cinquante francs.

" Ponetre.

" Fait double au Havre, 12 Décembre, 1870."

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On Monday, the 12th of December, the *Argos* arrived in Havre Roads, when the captain found permission had already been obtained to enter the outer harbour, and having entered the outer harbour, he transhipped the petroleum into the lighter.

Immediately on the arrival of the *Argos* in Havre outer harbour, the transhipment of the petroleum into the lighter was commenced, and was finished at 4.30 p.m. on the same day, and at midnight the *Argos* entered the dock, and was moored alongside the quay, whilst the remainder of her cargo was discharged, and a fresh cargo shipped for London; and, on the 16th, a fresh cargo having been loaded, the *Argos* came out of dock, and having re-shipped the petroleum, as she was obliged to do by the port authorities at Havre, sailed again for London, where she arrived at 9 a.m. on the 18th of December.

During the whole of this time no bill of lading was presented to the captain or officers of the *Argos*, nor was any request made for the delivery of the goods. In the ordinary course of business petroleum would be delivered on the quay at Havre, on presentation of the bill of lading. In this case it would not have been possible for the captain to have landed on the quay, even if the bill of lading had been presented. M. Génestal was well aware at the respective times that the *Argos* was in dock and moored alongside the quay, and of the various movements of the ship, and of the petroleum having been put on board the lighter.

By reason of the hereinbefore-mentioned circumstances the plaintiff was put to the following expenses:—

At Havre	72.85		
„ Honfleur	85.75		
„ Trouville	118.35		
Hire of Sloop	310.	£24	16*s.* 10*d.*
Labour transhipping petroleum			
Captain and Seamen's travelling expenses	24 5		
Broker's expenses, &c.		£5	0 0

And he also claims the following amount of freight:

Freight to Havre	24	4	5
Freight back to London	24	4	5

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And he also claims five days' demurrage for the detention of the *Argos* whilst engaged in travelling from port to port, which, at 10*l.* 10*s.* per day, as per bill of lading, amounts to 52*l.* 10*s.*, and she also consumed on her extra journeys five tons of coal, which, at 18*s.* per ton, amounts to 4*l.* 10*s.*

On the 16th of December Messrs. Rowell & Racine, the brokers in London for the *Argos*, wrote Messrs. W. H. Brown & Co. the following letter:—

"90, Lower Thames Street, London,
"16th December, 1870.

"Messrs. W. H. Brown & Co.

"Dear Sirs—Some few days ago we heard that the 147 barrels of petroleum that you shipped per *Argos*, for Havre, had been landed at Trouville. We now hear that this is a mistake, the authorities there having at the last moment refused to allow it to be landed. The captain, therefore, took it back to Havre, where he had to charter a sailing vessel to take charge of it, while he took his ship into port to load (not being permitted to go in with it on board). We expect the *Argos* back shortly with the 147 barrels on board, and give you notice of the facts at once, so that you may make any arrangements you consider necessary.

"The expenses incurred will, we fear, be enormous, and amount (with the freight) to about 120*l.* or 130*l.*

"(Signed) "Rowell & Racine."

but to which they had no reply. And in accordance with that letter Messrs. Rowell & Racine gave notice to Messrs. Brown & Co. of the arrival of the *Argos* with the said petroleum on board by the following memorandum:—

Memorandum.

"(Private.)

"Rowell & Racine,
"90, Lower Thames Street,
E.C.
"19th December, 1870.

"W. Horner,
"Messrs. W. H. Brown & Co.,
"Billiter Square.

"The *Argos*, Captain Richardson, from Havre, has arrived, having on board the undermentioned goods belonging to you.

"Washington, 1/147 . . 147 barrels petroleum."

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In reply, Messrs. W. H. Brown & Co. sent the following letter :—

"From Walter H. Brown & Co.,
"11, Billiter Square, London,
"E.C.
"19th December, 1870.

"To
"Messrs. Rowell &
"Racine.

"Seeing that you have failed to fulfil your engagement to deliver 147 barrels of petroleum at Havre, according to bills of lading for same in our possession, we herewith enclose you invoice for this lot, amounting to 240*l.* 10*s.* 2*d.*, and shall feel obliged by a cheque for the amount at your earliest convenience.

"We are buyers of this article at the present time, and although the market has dropped we shall be happy to treat with you for the purchase of the 147 barrels you have, as you inform us, brought back to London, per *Argos;* of course, at landing gauges.

"Walter H. Brown & Co."

And inclosed in their letter was the following invoice :—

"Messrs. Rowell & Racine,
"To Walter H. Brown & Co.

"11, Billiter Square,
"London,
"19th December, 1870.

"Washington, 1/147 . 147 barrels petroleum spirit.		
"Net gallons, 5,382, at 11*d.* per gallon .	£246	13 6
"Discount, 2½ per cent. .	6	3 4
	£240	10 2

And Messrs. Rowell & Racine, in reply to that letter, sent the following letter :—

"90, Lower Thames Street,
"London, E.C.,
"December 20, 1870.

"Messrs. W. H. Brown & Co.

"Gentlemen,—We have your favour of yesterday, and in reply beg to say that, as you are well aware that it was through no act of the ship's that the goods were not landed at Havre, we can hardly imagine that your claim is intended seriously.

"Nevertheless, as you seem inclined to dispute our claim, we

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beg to give you notice that unless it is settled before three o'clock (3 o'clock) this afternoon, we shall place the matter in the hands of our solicitor, and instruct him to proceed at once to recover the full amount of our account as rendered, and, further, the costs of lighterage of the goods from the ship to the wharf.

"We are, gentlemen,

"Your obedient servants,

"Rowell & Racine."

Messrs. W. H. Brown & Co. not having paid by the time mentioned, the goods were taken to Plaistow Wharf, and there lodged to the plaintiff's order; and the attorneys for the plaintiff, Messrs. Cattarns & Co., instituted a suit in rem under the Admiralty Jurisdiction of this Court against the said 147 barrels of petroleum. An appearance was entered to that suit by Messrs. Heather & Co., attorneys, and shortly afterwards they, on behalf of Messrs. W. H. Brown & Co., applied to the plaintiff's attorneys to release the goods and deliver them to the said W. H. Brown & Co. Whereupon the said Heather & Co., put in bail to answer damages and costs in this suit, and a delivery order was accordingly given, and the said goods were duly delivered to W. H. Brown & Co.; and in order to obtain the delivery of their said goods they had to pay the wharf charges and expenses consequent upon the said goods being landed at Plaistow Wharf.

Agreed on plaintiff's behalf,
Cattarns, Jehu, & Cattarns,
33, Mark Lane, E.C.,
Plaintiff's attorneys.

Agreed on defendant's behalf,
Heather, Son, & Gill,
Paternoster Row,
Defendant's attorneys.

On the 4th of January, 1872, the case was heard, on the above statement of facts, by Mr. Commissioner Kerr, who, on the 15th of January, gave judgment for the plaintiff for 135*l.* 5*s.* 8*d.*, the full amount claimed. Against this decision the defendant appealed to the Court of Admiralty, and the appeal came on for argument on the 7th of May, 1872.

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The Admiralty Advocate (*Dr. Deane, Q.C.*) and *Murphy*, for the appellant. The respondent is not entitled to recover the freight, because he did not deliver the goods according to the terms of the bill of lading, and never was ready to deliver them: *Osgood* v. *Groning* (1); *Appleby* v. *Myers* (2); Notes to *Cutter* v. *Powell* (Smith's Leading Cases, vol. 2, p. 1); Notes to *Pordage* v. *Cole* (1 Notes to Saunders by Williams, p. 548); *Taylor* v. *Caldwell* (3); Maclachlan on Shipping, p. 391. The respondent was bound to deliver the goods at the usual place of discharge in the port of Havre, that is, at the quay, and until he delivered the goods there he did not perform his contract. The fact that the performance of the contract by the respondent was rendered impossible by the French authorities cannot render the appellant liable to pay freight which has not been earned: *Paradine* v. *Jane* (4); *Spence* v. *Chodwick* (5); *Atkinson* v. *Ritchie* (6); *Barker* v. *Hodgson* (7); *Sjoerds* v. *Luscombe* (8); *Blight* v. *Page* (9); *Evans* v. *Hulton*. (10) The restriction imposed by the French authorities was temporary only, and the respondent ought to have waited until the restriction was removed: *Hadley* v. *Clarke* (11). The appellant can only be rendered liable for the freight, the return freight, or expenses, by virtue of a contract other than that contained in the bill of lading, to be implied from the conduct of the parties. But there are no circumstances to raise any such implied contract: *Vlierboom* v. *Chapman* (12); *The Soblomsten* (13); *The Teutonia* (14).

Milward, Q.C., and *Day*, for the respondent. The contract was performed on the part of the respondent, and the freight was earned when the *Argos* arrived with the goods on board at the port of Havre; certainly the contract was fully performed when the goods were discharged in the outer harbour, the place appointed by the local authorities. There was no obligation on the respondent to deliver the goods at any particular part of the port. All that the respondent

(1) 2 Camp. 466.
(2) Law Rep. 2 C. P. 651.
(3) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(4) Aleyn, 26.
(5) 10 Q. B. 517; 16 L. J. (Q.B.) 313.
(6) 10 East, 530.
(7) 3 M. & S. 267.
(8) 16 East, 201.
(9) 3 B. & P. 295, (n).
(10) 4 M. & G. 954.
(11) 8 T. R. 259.
(12) 13 M. & W. 230.
(13) Law Rep. 1 A. & E. 293.
(14) Law Rep. 3 A. & E. 394; Law Rep. 4 P. C. 171.

engaged to do was to carry the goods to the port of Havre and to deliver the goods over the ship's side; the respondent was ready and willing to deliver the goods, and, in fact, did deliver the goods according to the directions of Génóstal, the agent of the appellant: *Duthie* v. *Hilton* (1); *Ford* v. *Cotesworth* (2); *Geipel* v. *Smith* (3).

But should the Court be of opinion that the respondent failed to perform his contract, he is still entitled to maintain this suit, because, if there was any failure of performance on his part, it arose from the "incapacity of the goods" and from the default of the appellant or his consignee. The appellant ought to have known of the existence of the restriction at Havre, and it was his duty to make provision for the landing of the goods: *Adams* v. *Royal Mail Steam Packet Co.* (4); *Kearon* v. *Pearson.* (5) The appellant was not ready to accept delivery. The principle laid down by Lord Stowell in *The Fortuna* (6), and *The Friends* (7), is applicable to the present case: *The Felix* (8).

As to the expenses and the return freight, all that was done was done with the sanction of Généstal, the appellant's agent. The master of the *Argos*, when he found the appellant was not ready to accept delivery, did the best he could for the interests of the appellant, the owner of the goods, and the appellant is liable to pay the expenses so incurred, as well as the return freight: *Christy* v. *Row.* (9)

Murphy, in reply, cited *Brown* v. *Tanner* (10); *Gatliffe* v. *Bourne.* (11) It appears, from the note in the margin of the bill of lading, that the goods were to be landed by the respondent.

Cur. adv. vult.

March 11, 1873. SIR ROBERT PHILLIMORE. This is a cause of appeal from the City of London Court, arising out of an agreement made for the use or hire of the ship *Argos*, under the 32 & 33 Vict. c. 51, s. 2. I regret to say that I derive no assistance from the

(1) Law Rep. 4 C. P. 138.
(2) Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544.
(3) Law Rep. 7 Q. B. 404.
(4) 5 C. B. (N.S). 492; 28 L. J. (C. P.) 33.
(5) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(6) Edwards, 56.
(7) Edwards, 246.
(8) Law Rep. 2 A. & E. 273.
(9) 1 Taunt. 300.
(10) Law Rep. 2 Eq. 806; Law Rep. 3 Ch. 597.
(11) 4 Bing. N. C. 314; 3 M. & G. 643.

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judgment of the Court below, which is in these words: "As I understand you are going to appeal in this case, all I shall say is, that I give judgment for the plaintiff. The amount, I believe, is agreed at 135*l.* 5*s.* 8*d.*"

It appears to me that the reason here assigned for not stating the grounds of a judgment involving important questions of law is based upon a very mistaken view of the duty of a judge of the court of first instance, and deprives the appellate court of the assistance which it has a right to expect.

All the material facts of this case are admitted. [His lordship, after stating the facts as agreed, proceeded:]

The plaintiff claims for freight out, demurrage, freight back, and expenses, the sum of 135*l.* 5*s.* 8*d.*, for which he has recovered judgment in the Court below. The defendant contends in substance that the plaintiff never performed his contract of carrying the petroleum to the usual place of delivery at Havre, which he asserts to be the quay; that as the plaintiff was never ready to give delivery at the agreed place the defendant was not obliged to take the goods; and that at all events, though neither plaintiff nor defendant were holden to blame for the non-delivery, the contract was unexecuted, and no right of action could accrue to either party.

The bill of lading contains the two stipulations: (1) That the goods are to be taken out within twenty-four hours after arrival, or pay demurrage; and (2) that they are to be delivered at the port of Havre.

Under this contract it was the duty of the defendant to take out the goods, and of the plaintiff to bring the goods to the port of Havre, where they could be taken out. Indeed, it is one of the admissions in the case that the captain could not have landed them on the quay. I think that when the ship, on her first arrival at Havre, went under the direction of Génestal to Honfleur and to Trouville, she had performed the duty of bringing the goods to the port, and was exonerated from the necessity of waiting a longer time than she did; and in any case I think that, upon the second occasion, when she actually did deliver the goods on board the lighter, there was an entire execution of the contract, and the shipowner became entitled to his outward freight and his demurrage up to that time,

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But if this opinion be erroneous, and there was not an entire execution of the contract, I should still be of opinion that the shipowner was entitled to his freight, because, to borrow the reasoning of Lord Stowell in *The Fortuna* (1), there was such an execution as he could effect consistently with the incapacity under which the cargo laboured. The shipowner had done his utmost to consummate the contract; it did not lie with him that the contract was not performed; it was stopped by the incapacity of the cargo.

It remains to consider that part of the claim which relates to the return freight and certain incidental expenses. In the first place, I am of opinion that Généstal must be considered as acting on behalf of the owners of the cargo; he was present and aware that the petroleum was reshipped. In the second place, it must be remembered that the authorities at Havre had power to compel the master to take the cargo on board. In these circumstances, what was the duty of the master of the ship? He was obliged to take the goods out of the territorial waters of France. Would he have acted properly if he had then thrown them overboard? I should have said on principles of common sense and justice he could not take this course; and I feel myself strengthened by the opinion of Sir James Mansfield, no inconsiderable authority, and himself expressing the opinion of the Court of Common Pleas in the case of *Christy* v. *Row* (2): "Where a ship is chartered upon one voyage, outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision which I have been able to find determines what shall be done in case the voyage is defeated: the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandize, it would be of great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided." And though this judgment was delivered in 1808, I have been unable to find a further

(1) Edwards, 56. (2) 1 Taunt. at p. 315.

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explanation of this subject. If, however, the master had not this duty of necessary agent to the cargo thus re-shipped after delivery, and it was competent to him to have thrown the goods overboard, he is a fortiori entitled on restoring them to the owner to a lien upon them for the expenses of their preservation; and the proceeding in rem in a Court having Admiralty jurisdiction is the mode which he has adopted for enforcing that lien. I think, therefore, that the plaintiff is entitled to recover the return freight and the incidental expenses.

I wish to observe that I have consulted the cases, for reference to which I am indebted to the industry of counsel, though I have not thought it necessary to advert to more than those I have mentioned.

I think I should also say a word as to the delay in the adjudication of this case. It is due to the following cause:— After the argument, and while I was considering my judgment, the Court of Common Pleas prohibited a county court from exercising jurisdiction in a case of this description. I was unable to agree with the judgment of the Common Pleas; but for reasons which I have before stated, I thought myself bound to obey it, and as my jurisdiction in these matters is purely appellate, to dismiss the suit for want of jurisdiction; but I gave leave to appeal to the Privy Council, suggesting that if they took the same view as I did, they might think themselves warranted in coming to a different decision from that of the Common Pleas. This they have done, and have remitted the cause to the jurisdiction of this Court. (1)

I affirm the decree of the Court below, and dismiss the appeal with costs.

Solicitors for appellant: *Heather & Sons.*
Solicitors for respondent: *Cattarns, Jehu, & Cattarns.*

(1) See Law Rep. 3 A. & E. 568.

THE ÆOLUS. (6069.)

1873

Jan. 21.

Salvage—Pilotage.

A Dutch barque was riding at anchor off Deal, and waiting to proceed down Channel, and a waterman who, though not a licensed pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7*s.* a day, with 5*l.* in addition, for navigating the vessel as pilot until she arrived off Beachy Head. The day after the waterman came on board, and whilst the barque was still at anchor, a gale came on, and the tempestuous state of the weather caused the vessel to drive, and rendered it necessary to slip the chain, when under the direction of the waterman the vessel was taken through the Gull Stream and brought up in safety in Margate Roads.

In a salvage suit instituted on behalf of the waterman and other persons who had rendered services to the vessel, the Court *held*, that the services rendered by the waterman were within the scope of his contract, and that he was not entitled to claim as a salvor.

THIS was a salvage suit instituted on behalf of Henry Caspell and George Porter, of Deal, mariners, and others the owners and crews of the luggers *Seaman's Glory* and *Tiger* against the barque *Æolus*, her cargo and freight, to recover salvage reward for services rendered under the circumstances noticed in the judgment.

Jan. 17. *The Admiralty Advocate* (*Dr. Deane, Q.C.*), and *R. E. Webster*, appeared for the plaintiffs.

Butt, Q.C., and *E. C. Clarkson*, for the defendants.

The following authorities were referred to in addition to those cited in the judgment: *The Duke of Manchester* (1); *The General Palmer* (2); *The Enterprise* (3); *The Columbus.* (3)

Cur. adv. vult.

Jan. 21. SIR ROBERT PHILLIMORE. In this case the vessel to which the services were rendered was of considerable value—the agreed value of the ship, freight, and cargo being 40,000*l.* On the 16th of January, 1872, the *Æolus*, a Dutch barque, was riding by her starboard anchor close to the Deal Bank Buoy, and about a mile from the South Brake Buoy, waiting to proceed down Channel. She was in want of a pilot, and her master engaged George Porter, one of the plaintiffs, who came on board on the 16th, and agreed

(1) 2 W. Rob. 470; 6 Moore's P. C. 90. (2) 2 Hagg. Adm. 176.
(3) 2 Hagg. Adm. 178, n.

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THE ÆOLUS.

to assist in navigating the barque as pilot until her arrival off Beachy Head, for the sum of 7*s.* a day whilst on board her, and the sum of 5*l.* in addition. Porter was not a licensed Trinity House pilot, but he was a waterman who often acted as pilot. The barque remained at anchor until the 17th, when it came on to blow a whole gale from the S. to S.S.W., and the vessel began to drive. Her master, who was examined as a witness, and appeared to be a person competent to command the vessel, conferred with Porter, and they agreed that the best course to pursue was to slip the anchor. They also agreed that a signal should be made for a boat to come off to the barque to take a message ashore for an anchor and chain to supply the place of the anchor and chain they were about to slip. The lugger *Seaman's Glory* accordingly came off, and Henry Caspell, another of the plaintiffs, was put on board the barque with some difficulty. Caspell was put on board because Porter, fearing that his orders might not be understood by the foreign crew, wished to have some one on board with him who had a thorough knowledge of the English language, and also to have some one acquainted with the navigation who could assist in looking out for the buoys. The chain was then slipped, and Caspell went forward to look out for the buoys, while Porter directed the navigation of the vessel, and the barque was taken through the Gull Stream, and was brought up in safety on the evening of the 17th in Margate Roads. In the meantime the lugger *Seaman's Glory* went to Deal for the anchor and chain, but being herself too small to bring them off to the barque, for they were of large size, a larger lugger called the *Tiger* was engaged, and brought the anchor and chain alongside, and her crew got them on board the barque. This service was rendered with some peril to those on board the *Tiger*, and damage to the extent of about 40*l.* was done to the lugger herself, a fact which proves the danger to which the lugger was exposed. Two of the crew of the *Tiger* were injured while getting the anchor on board—one in the head and one in the knee—by the swinging of the anchor occasioned by the lurching of the lugger. I have no hesitation in pronouncing, and in fact it was admitted by the counsel for the defendants, that Caspell and the owners and crews of the two luggers are entitled to recover as salvors. Indeed, having regard to the tempestuous state of the

weather, and the dangerous vicinity of the Brake Sand, and the manner in which the anchor and chain were brought out, I am of opinion that the services rendered by these plaintiffs were highly meritorious, and that the Court ought to reward them with a liberality proportioned to the value of the property. The total sum that I shall award is 280*l*. The distribution of this sum leads the Court to consider the legal question whether the services of Porter are to be considered as salvage services, or as pilotage services only. There is one point preliminary to this question, which I must now consider. It was strongly pressed upon me, in the first instance, that Porter was not a licensed pilot, but only a waterman; but I think, on principle, this fact can make no difference. Porter took upon himself to discharge the duties of a pilot, and cannot throw off the character he assumed. My opinion on this point is confirmed by the decision of Lord Stowell in the case of *The Michael.* (1) That learned judge there refused to allow the claim of fishermen taken on board as pilots in the Channel to be rewarded as salvors, observing that they were engaged as pilots, and if they assumed that character, they ought to adopt the rules and be remunerated according to the rates of that service. On the authority of this case I conclude that whatever the law is as to pilots, that law is applicable to the plaintiff Porter. I am of opinion that it would be extremely dangerous to allow the general rule that pilots cannot claim as salvors to be too easily violated; the exceptions to this rule should be few and clearly defined. It ought to be well understood that the services of a pilot are not slightly to be converted into salvage services. I find this opinion strengthened by the authority of cases decided in this Court. The case of *The Frederick* (2) is an example falling within one class of cases which have established an exception to the general rule. In that case Dr. Lushington said: "It has been urged in the argument for the owners, that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed that it is a settled doctrine of this Court that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward.

(1) Referred to in the case of *The Columbus* (2 Hagg. Adm. 178, n.)
(2) 1 W. Rob. 16.

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If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition he would be subjected to no censure, and if he did take charge of her he would be entitled to a salvage remuneration." Another class of cases establishes the proposition that a pilot, although he may have been originally employed as a pilot to render pilotage services to a vessel not in distress, may yet recover salvage reward, provided circumstances supervene to alter the character of the service. But the present case does not fall within either of these exceptions. The vessel was not in distress at the time when the pilot went on board, and the subsequent circumstances were not such as to require him to act in any other capacity than that of a pilot. He displayed local knowledge and the peculiar skill of a pilot, and thus brought the vessel in safety to an anchor in Margate Roads, but such knowledge and skill he contracted to apply; so that the services rendered by him were strictly within the scope of his contract. Before leaving this point I will call attention to the case of *The Joseph Harvey* (1), where Lord Stowell said: "It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible that the safe conduct of a ship into a port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service. But in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor."

That seems to me sound doctrine, to which I mean to adhere. After thus reviewing the facts, I am bound to pronounce that they do not bring Porter's case within the exceptions, which would give him the right to claim salvage in this court, and I therefore reject his claim.

I shall distribute the sum I have awarded as follows:—To the *Seaman's Glory* I award 70*l.*; to Caspell, 30*l.*; to the owners of the *Tiger*, for the damage sustained, 40*l.*; and in respect of the salvage services of the *Tiger* I award 140*l.*, out of which sum double shares must go to the two injured men.

Solicitors for plaintiffs: *Lowless, Nelson, & Jones.*
Proctor for defendants: *C. Waddilove.*

(1) 1 C. Rob. 306.

THE ANTILOPE. (6240.)

1873

Jan. 14.

Salvage—Pleading.

In a suit instituted on behalf of the owners, master, and crew of a steam tug, to recover salvage reward for salving a disabled vessel and her cargo, it appeared by the petition that persons other than the plaintiffs in the cause had assisted in the service, and in an article in the answer filed on behalf of the owners of the salved vessel and her cargo, the defendants alleged that they had been ordered by a Court of competent jurisdiction to pay to such other persons the sum of 240*l.* in respect of the assistance so rendered by them.

The plaintiffs moved to strike out this article. The Court holding that the article was relevant to the matters in issue in the suit rejected the motion.

THIS was a cause of salvage instituted on behalf of the owners, master, and crew of the steam tug, *City of London*, against the screw steam ship, *Antilope*, and her cargo. The petition alleged, among other things, that the *Antilope* having received damage by collision with another vessel in the East Bay of Dungeness, was making water very fast when the *City of London* fell in with her. The *City of London* accompanied the *Antilope* towards the shore, and the *Antilope* was put ashore at the west end of the Roar Bank. At the request of the master of the *Antilope*, the *City of London* remained by the *Antilope* during the night, and at daybreak the *City of London*, and a lugger called the *Galatea*, which had come up, assisted to lighten the *Antilope* forward. When a portion of the cargo of the *Antilope* had been taken from her forehold, the *City of London* took her off the sand and ultimately towed her to Dover in safety.

The 5th, 6th, and 12th articles of the answer filed on behalf of the owners of the *Antilope* and her cargo, were as follow:—

5. A small portion of the cargo of the *Antilope* was placed on board the *City of London*. The *City of London* was unable to take any more cargo on board, and such of the rest of the cargo as was taken out of the *Antilope* was placed on board certain smacks or luggers named the *Galatea*, *Friend to all Nations*, *Three Sisters*, and *General Blucher*, whose owners, masters, and crews instituted suits, to obtain rewards for their services, in the Court of Admiralty of the Cinque Ports.

6. Before the events next hereinafter stated, the *Antilope* had been boarded by Mr. William Grant, clerk to Messieurs Latham & Company, of Dover, French consular agents, and by two chief boatmen of the coast-guard, with their crews and a large number of labourers, who were employed in transhipping the cargo;

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the said Mr. William Grant and the said chief boatmen consulted with and gave the benefit of their advice and local knowledge to the master of the *Antilope*, and they or one of them gave all the orders and directions to the master of the *City of London*.

12. The defendants in this suit have been decreed by the judge of the Court of Admiralty of the Cinque Ports to pay to the plaintiffs in the suits in the 5th article mentioned, the sum of 240*l*.; and they are further under liability to the said chief boatmen of the coast-guard and their crew, and to the labourers, in the 6th article mentioned, for their services as hereinbefore stated.

R. E. Webster, on behalf of the plaintiffs, moved to reject the 12th article of the answer. The amount due to the plaintiffs in this suit must be determined without regard to the sum awarded to other salvors. The *Due Checchi* (1) is on all fours with the present case.

W. G. F. Phillimore, for the defendants. The *Due Checchi* is distinguishable from the present case. It was there sought to bring under the notice of the Court events which had happened out of Court, and to plead against the owners of the cargo a compromise made by the owners of the ship. But the article objected to in the present case states that a Court of competent jurisdiction has awarded a certain sum to be paid out of the proceeds of the property saved. This is a matter of which the Court must take cognizance; because, in considering the value of the property for the purpose of the present case, the Court must consider the charges imposed upon the property. By the decree of the Court of Admiralty of the Cinque Ports, the value of the property salved is reduced by 240*l*.

Webster, in reply.

SIR ROBERT PHILLIMORE. I cannot accede to this application to strike out the 12th article of the answer; nor do I think that in retaining it I shall run counter to my decision in the *Due Checchi*. (1) In that case it was pleaded that a certain sum of money had been paid to the salvors out of court. But in the present case some salvors not parties to the suit now before the Court have instituted suits in another Court of competent jurisdiction, and have recovered salvage reward in that Court. I think it has been correctly stated by Mr. Phillimore, that when the time comes for me

(1) See note, p. 35.

to consider what amount I shall award to the plaintiffs in this suit, I must take into account the net value of the property salved, and it is therefore proper that I should know that out of the proceeds of the property a sum of money has been ordered to be paid by a court of competent jurisdiction. I must dismiss the motion with costs.

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Solicitors for plaintiffs: *Lowless, Nelson, & Jones.*
Proctors for defendants: *Dyke & Stokes.*

THE DUE CHECCHI. (6004.)

1872
April 23.

THE DUE CHECCHI

This was a cause of salvage instituted against the Italian barque *Due Checchi*, her cargo, and freight. The value of the barque was 1650*l.*; the value of her cargo was 3060*l.*; the value of her freight was 700*l.* The 21st article of the petition was as follows: "The owners of the barque have paid to the plaintiffs in discharge of the proportion of salvage due from the ship and freight in respect of the above-mentioned services the sum of 300*l.*"

W. G. F. Phillimore, on behalf of the owners of cargo, moved to have this article struck out.

E. C. Clarkson, contrà.

SIR ROBERT PHILLIMORE ordered the article to be amended by leaving out the amount paid to the plaintiffs, and held that the judgment of the Court as to the value of the services rendered to the cargo could not be governed by any transaction which had taken place out of Court; but that, if the article were so altered as simply to contain a statement that the owners of the barque had since the institution of the suit settled with the plaintiffs in respect of the salvage due from the ship and freight, it would not be objectionable, and might be pleaded, in order to inform the Court that the claim was against the cargo only.

Proctor for plaintiffs: *Coote.*
Solicitors for defendants: *Waltons, Bubb, & Waltons.*

1872
Nov. 19.

THE ONEIZA. (6194—6196—6199.)

Practice—Change of Solicitors.

A suit was instituted against a vessel, and an appearance entered by a firm of solicitors on behalf of the owner. A sum of money was paid into Court in lieu of bail, and the solicitors thereupon procured the release of the vessel, and incurred costs in defending the suit on behalf of the owner. Whilst the suit was pending, and before any sum had been paid to the said firm of solicitors on account of such costs, another firm of solicitors entered a second appearance in the same suit on behalf of the same defendant. On an application made on behalf of the firm of solicitors by whom the first appearance had been entered, the Court made an order setting aside the second appearance, and condemned the defendant in the costs of the motion.

This was a consolidated cause of wages promoted on behalf of the mate and others of the crew of the *Oneiza* against that vessel and her freight. An appearance had been entered by Messrs. Ingledew, Ince, & Greening on behalf of the owner of the vessel; and in order to obtain the release of the vessel a sum of money was paid into Court in lieu of bail. Before the consolidated cause came on for hearing, the defendant admitted his liability in the suit, and the claims of the plaintiffs were referred to the registrar to report the amount due. The registrar by his report found that the plaintiffs were entitled to recover 543*l.* 1*s.* 1*d.*, and the costs of the reference. Up to this stage of the proceedings, Messrs. Ingledew, Ince, & Greening had acted as the solicitors of the defendant in conducting the suit on his behalf, but after the registrar made his report and before the judge had made an order for the payment of the money out of Court Messrs. Thomas & Hollams, solicitors, filed a praecipe to enter an appearance in the cause on behalf of the defendant "in lieu of Messrs. Ingledew, Ince, & Greening." Messrs. Ingledew, Ince, & Greening served on Messrs. Thomas & Hollams a notice of motion which was in substance as follows:—

"We, Ingledew, Ince, & Greening, hereby give you notice that we shall on the 19th of November next move the judge in Court to set aside the appearance entered by Messrs. Thomas & Hollams in this cause on behalf of the defendant, and to direct payment out to us as defendant's solicitors of the balance which will

remain in Court after payment thereout of the amount reported to be due to the plaintiffs, and their costs to be taxed; and to further order that defendant be not allowed to change his solicitors in this suit until our costs against him are paid, and to condemn defendant in the costs of this motion."

A similar notice of motion was served on the solicitors for the plaintiffs in the suit.

In support of the motion, an affidavit of Mr. Greening, a member of the firm of Ingledew, Ince, & Greening, was filed. The affidavit stated, inter alia, as follows:—

"The costs of my said firm for defending the cause, as well as I can estimate, will amount to little short of, and may possibly exceed, 150*l.*

"My said firm have received no payment whatever from the said defendant, or from any person on his behalf, on account of the said costs.

"After payment out to plaintiffs' solicitors of the amount due to plaintiffs, and of their taxed costs, there will remain in Court, as I believe, a sum sufficient or partly sufficient to pay the said costs of my firm.

"As my firm have always contemplated obtaining out of Court a balance sufficient to pay the said costs, we have never asked defendant for payment on account, although we have made no arrangement with him on the subject, and but for the fact of our knowing there would be a balance, we should certainly have taken the precaution of obtaining money on account before proceeding.

"No offer whatever to pay the costs of my firm in consideration of our consenting to a change of solicitors has been made, and if a change of solicitors is permitted, we shall lose all control on the said money in Court."

T. R. Kemp moved pursuant to the notice of motion.

E. C. Clarkson, on behalf of the plaintiffs, did not oppose the motion.

SIR R. PHILLIMORE. I think Mr. Kemp is entitled to have his application granted, and I shall make an order according to the terms of the notice of motion. Messrs. Thomas & Hollams have had notice of this motion, and therefore an opportunity of being here to-day. If they are desirous of entering an appearance they will be able to do so upon application after the taxed costs due to Messrs. Ingledew, Ince, & Greening have been paid out of the registry.

Proctors for plaintiffs: *Clarkson, Son, & Greenwell.*

Solicitors for defendant: *Ingledew, Ince, & Greening.*

1873
Jan. 28.

THE ONWARD. (5662.)

Bottomry—Communication with Owner of Cargo—Bill of Exchange given as Collateral Security.

An American vessel laden with a cargo of timber, in the prosecution of a voyage, sustained damage, and was compelled to put into the Mauritius to repair and refit. She arrived there on the 11th of June, 1870, and her master, being without funds, placed the ship in the hands of H. & Co., a firm at the Mauritius, and they, before any attempt had been made to obtain money on the personal credit of the owners of the ship, who were affluent merchants in New York, proposed to advance money for the repairs on the master's draft on London, on his giving a bottomry bond on the ship, freight, and cargo, as collateral security. The master and H. & Co., on the 29th of July, wrote to the owners of the ship, informing them of this proposal, and on the same day the master and H. & Co. wrote to the owners of the cargo, informing them that the vessel had sustained damage, and would have to undergo repair; but the letters to the owners of the cargo omitted all reference to the proposed loan on bottomry, and informed the owners of the cargo that they should hear further particulars by the next opportunity. The letters written by the master and H. & Co. to the owners of the ship were forwarded by the owners of the ship to the owners of the cargo; but the owners of the cargo did not receive these letters till the 8th of September, when it was too late for them to communicate with the master by post. On the 13th of October, after the repairs had been completed, the master gave bills and executed a bottomry bond on the ship, freight, and cargo, according to the terms of the proposal made by H. & Co., which had long before been assented to by him. The bills were made payable to H. & Co., and were drawn on B. & Co., their agents in London, at ninety days' sight. H. & Co. gave the master a memorandum, stating that the bills were taken as collateral security, and that the bond should be cancelled on the prompt payment by the owners of the vessel to B. & Co. of the amount of the bills. On the 15th of October, the ship sailed from the Mauritius, and safely arrived at Liverpool, her port of discharge, on the 7th of February, 1871. After the ship had sailed, the owners of the cargo were for the first time informed by letter from H. & Co. that the bottomry bond had been given. The bond was transferred, and the bills of exchange were indorsed to B. & Co. Neither the master nor the owners of the vessel had any funds in the hands of B. & Co., and they neglected to provide funds to take up the bills, and informed B. & Co. that they had determined not to take up the bond.

In a suit to enforce the bond against the ship, freight, and cargo:—

Held, that the bond was invalid as to the cargo, on the ground that there was not, under the circumstances of the case, such a communication with the owners of the cargo as to satisfy the law.

Semble, that the bond was also invalid as to the cargo, upon the ground that the prospect of benefit to the cargo was not such as to justify the master in granting a bottomry bond upon the cargo.

This was a cause of bottomry, instituted on behalf of Messrs. Baring Brothers & Co., against the American ship *Onward*, her

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freight and cargo. No appearance was entered on behalf of the owners of the ship and freight, and the judge pronounced for the validity of the bond as against the ship and freight, and condemned the ship and freight in the amount due on the bond. The proceeds of the ship and freight not being sufficient to satisfy the bond, the plaintiffs carried on the suit against the cargo. The owners and shippers of the cargo, Messrs. Findlay & Co., of Glasgow, trading also under the style of Todd, Findlay, & Co., of Moulmein, appeared and defended the suit.

The *Onward*, whilst on a voyage from Moulmein to Queenstown or Falmouth for orders, laden with a cargo of teak, was compelled, on the 11th of June, 1870, to put into Port Louis, in the Island of Mauritius, in order to repair and refit. The master placed his ship in the hands of Messrs. Houdlette & Co., merchants at Port Louis. He was without funds, and had no means to pay the expenses of the necessary repairs.

Shortly after the arrival of the ship at Port Louis, and before any attempt had been made to obtain money on the personal credit of the owners of the ship, who were affluent merchants in New York, Messrs. Houdlette & Co. offered, in case the master should require them to do so, to make the necessary advances for the ship, and to take his draft on Messrs. Baring Brothers & Co., of London, for the amount of the advances, together with a bottomry bond on ship, cargo, and freight. To this proposal the master assented. On the 13th of October, after the repairs had been executed, a bottomry bond on ship, freight, and cargo, was executed in favour of Messrs. Houdlette & Co., for the sum of 6238*l.* 12*s.* 9*d.*, which represented the sum advanced for repairs, and bills of exchange, drawn by the master on Messrs. Baring Brothers & Co., payable to Messrs. Houdlette & Co. ninety days after sight, for the sum of 5130*l.* 9*s.* 3*d.*, the amount advanced for repairs, were handed by the master to Messrs. Houdlette & Co. At the time the bond was executed and the bills drawn, Messrs. Houdlette & Co. gave the master the following letter :—

Captain J. Hewitt, Port Louis, Mauritius,
Ship *Onward*. 13th Oct., 1870.

Dear sir,—We beg to acknowledge the receipt of your bills at ninety days' sight on Messrs. Baring Brothers & Co., London, in our favour, for 5,130*l.* 9*s.* 3*d.*,

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sterling. These bills we take with a bottomry bond on your ship, freight, and cargo, as collateral security, with the express understanding and agreement that the bond shall be cancelled on the prompt payment by the owners of the vessel to Messrs. Baring Brothers & Co. of the amount of the above bills, together with their charges, otherwise the bond to be enforced, principal and interest.

We remain, dear sir,
Your obedient servants,
Houdlette & Co.

On the 15th of October the ship left Port Louis, and she arrived in safety at the port of Liverpool, which was her port of discharge, on the 7th of February, 1871. Before the ship arrived, Messrs. C. & R. Poillon, the owners of the ship, determined not to take up the bottomry bond, and on the 6th of January, 1871, they wrote to the master informing him that they had so determined. The bills of exchange were indorsed to the plaintiffs by Houdlette & Co., and were, together with the bond, sent to the plaintiffs. Mr. Theobald, one of the managers of the plaintiffs' firm, was, at the hearing of the cause, called as a witness on behalf of the plaintiffs, and he proved that the plaintiffs acted as agents for Houdlette & Co., and had furnished them with a letter of credit for the purpose of advances on bottomry bonds, and had undertaken on the receipt from them of bottomry bonds securing such advances to honour their drafts. He proved also that the amount of the bills had never been paid, and the master had no funds in the plaintiffs' hands, or any authority to draw on them, and that the bills of exchange had never left the plaintiffs' hands.

The principal question raised in the suit was whether the bond was invalid so far as related to the cargo for want of sufficient communication with the defendants. The substance of the evidence on this point appears from the facts and correspondence set out in the judgment.

It was also contended on behalf of the defendants that the bond could not be enforced, because it was given only as a collateral security for the payment of the bills of exchange, and the bills of exchange were accepted and paid, or if not accepted and paid were not duly presented, or, if presented and dishonoured, were not protested, and due notice of dishonour was not given to the drawer or to the defendants.

In the course of the case evidence was tendered on behalf of the defendants, for the purpose of proving that the master ought to have transhipped the cargo at the Mauritius; but the counsel for the plaintiffs objected that the point was not raised by the pleadings.

[SIR ROBERT PHILLIMORE. No doubt it was competent to the defendants to set up in their answer the special defence that the master, being in the circumstances and by the force of necessity the agent for the cargo, should have transhipped the cargo rather than have contracted a loan on bottomry. But here the question is whether this defence, not having been set up specially, as has been done by the defendants in respect to the duty of communication, can be raised. The plaintiffs complain that if evidence is admitted they will be taken by surprise, and I am of opinion that according to the practice of this Court the defence ought to have been set up specially, but at the same time, that the defendants may have an opportunity of advancing it, I shall give the defendants the option of correcting their pleading. If the defendants reject this offer I shall reject the evidence.]

The defendants elected not to raise the question as to the duty of the master to tranship the cargo.

The case was heard on the 27th and 30th of November, and 7th and 9th of December, 1872.

Milward, Q.C., Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs.

Benjamin, Q.C., and *Cohen*, for the defendants.

The following cases were cited on the question of communication: *The Bonaparte* (1); *Glascott* v. *Lang* (2); *The Cargo ex Sultan* (3); *The Hamburg* (4); *The Lizzie* (5); *The Panama* (6); *The Karnak* (7); *The Lord Cochrane* (8); *Duncan* v. *Benson* (9); *Australasian Steam Navigation Co.* v. *Morse* (10); *The Gratitudine.* (11)

(1) 3 W. Rob. 298; 8 Moo. P. C. 459.
(2) 2 Phillips, 310.
(3) Swa. 504.
(4) Br. & L. 253, 273.
(5) Law Rep. 2 A. & E. 254, 259.
(6) Law Rep. 3 P. C. 199.
(7) Law Rep. 2 A. & E. 289; Law Rep. 2 P. C. 505.
(8) 2 W. Rob. 320.
(9) 3 Ex. 644; 18 L. J. (Ex.) 169.
(10) Law Rep. 4 P. C. 222.
(11) 3 C. Rob. 240.

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On the point raised with respect to the bills of exchange being taken in satisfaction of the bond, the following cases were cited: *Stainbank* v. *Shepard* (1); *The Emancipation* (2); *The Staffordshire.* (3)

The following authorities were also referred to: *The Hero* (4); Parsons on Shipping, ed. 1869, vol. i. p. 144 (n.); 19 & 20 Vict. c. 97, s. 5; *The Daring.* (5)

Cur. adv. vult.

Jan. 28, 1873. SIR ROBERT PHILLIMORE. This is a cause of bottomry instituted on behalf of Messrs. Baring Brothers, the legal holders of a bottomry bond on the ship *Onward*, her freight and her cargo, against the owners of the cargo, Messrs. Findlay & Co., of Glasgow.

The *Onward* is a large ship of 933 tons, belonging to the United States of North America, and whilst on a voyage from Moulmein to Queenstown or Falmouth for orders, and from thence to a port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, laden with a cargo of teak timber, was compelled to put into Port Louis, in the island of Mauritius, in order to repair and refit.

The plaintiffs allege that the master of the *Onward* was without funds or credit at that port, and was compelled to raise for the purposes of repairs and necessary disbursements a sum of 24,369 dollars and 69 centimes, being 5130*l.* 9*s.* 3*d.*, and it appears in the amended pleading that this bond was given as a collateral security for a bill of exchange drawn for the same amount on Messrs. Baring.

The *Onward* arrived at Liverpool on the 7th of February, 1871; the ship was sold by order of the Court; the proceeds of the sale and the freight were paid into Court. By decree of the 9th of May the Court pronounced for the validity of the bond, so far as regarded the ship and freight, and condemned the proceeds of them in the amount due on the bond.

From a memorandum supplied to me from the Registry it

(1) 13 C. B. 418, 443; 22 L. J. (Ex.) 341.
(2) 1 Wm. Rob. 124–130.
(3) Law Rep. 4 P. C. 194.
(4) 2 Dod. 139.
(5) Law Rep. 2 A. & E. 260.

appears that the vessel was appraised on the 11th of April, 1871, at 2000*l.*; she was offered for sale on the 19th of April, 1871, but no bid could be obtained. She was again appraised on the 23rd of April, 1871, at 1700*l.* and sold on the 26th of April, 1871, for 1870*l.* The market for ships was in a very depressed state at that time.

The statement of account of the proceeds of sale, of the payments thereout, and of the claims thereon, is as follows:—

"Gross proceeds of vessel . .		£1870 0 0
Marshal's fees, &c., on sale . . .		121 16 8
Net proceeds		1748 3 4
Freight paid into court		2338 6 6
Total .		£4086 9 10
Payments thereout.		
Wages of crew . . .	£604 14 9	
Disbursements made by bondholders paid to them by order of Court . .	240 9 6	845 4 3
Leaving a balance in court . . .		3241 5 7
There were prior claims thereon.		
(*a*) Costs as to wages of crew . . .		
(*a*) Costs as to payment of disbursements by bondholders		
Master's claim		
Costs as to ditto		
Amount of bottomry bond on ship, freight, and cargo		6238 12 9

(*a*) In respect of these two claims the bondholders have been given a prior lien on the proceeds by order of the Court."

It is said that the master's claim amounts to 1200*l.*, and the result will be that nearly the whole amount of the bond, if valid, will have to be paid by the owners of the cargo.

The defendants, the owners of the cargo, contend that the bond is invalid as relates to the cargo on various grounds, which may be classed as follows:— 1. That the bond was given only as a collateral security for the payment of the bills of exchange, which bills were accepted and paid, or, if not accepted and paid, were not duly presented, or, if presented and dishonoured, were not

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protested, and due notice of the dishonour of the said bills was not given to the drawer or to the defendants. 2. That the bond was entered into with undue haste, and before it was ascertained that the money could not be raised upon the credit of the owners of the ship. 3. That the bond was given on the cargo without due communication, that is, practically without communication to the owners of the cargo. 4. That if the communication made to the owners of the cargo was sufficient, the bond was given before sufficient time had elapsed to enable the owners of the cargo to send their answer. Lastly, that the facts disclose that from first to last there was a fraudulent intention of throwing upon the owners of the cargo the obligation which ought to have been borne by the owners of the ship, and that for one, or several, or all of these reasons, the owners of the cargo ought to be dismissed from this suit.

I will endeavour, first, to state the facts admitted or proved, and then to state what I conceive to be the law in relation to them, and to the positions to which I have adverted as being set up in defence. First, as to the facts:

It appears that on the 5th of September, 1868, Messrs. Poillon became the owners of the ship, and announced that fact on the 5th of August, 1869, to Messrs. Findlay & Co., the defendants. Messrs. Poillon dwelt at New York.

The charterparty was dated the 6th of January, 1868. Messrs. Findlay & Co., the owners of the cargo, are merchants at Glasgow, and have a house or agents of the same name at Moulmein, and the *Onward* set sail from Moulmein on the 1st of April, 1870 (it is not necessary to go into the earlier history of the vessel), with a cargo of teak put on board by the Findlays' house at Moulmein for Europe; but bad weather and considerable damage consequent thereupon compelled the ship to put into the Mauritius on the 11th of June. On the 13th she was towed into harbour. On the 14th or 15th surveyors recommended the captain to discharge the cargo. On the 17th the discharge began.

On the 29th the captain wrote a letter to his owners (Messrs. Poillon) at New York, in which he set forth the misfortunes which had befallen the ship, and added that on the 31st of May, after a consultation with the officers and crew, it was found expedient for the benefit of all concerned to deviate from the proper course of

the voyage "and seek this our nearest port for repairs." The letter then sets out what had taken place on the 13th, 15th, 16th, and 17th, and continues: 1873 THE ONWARD.

"We are now a little more than half discharged, the ship still making water about four inches per hour, and will have to go in dock in all probability. Tenders for the work have been duly sent in, and as near as can be estimated, it will take from 15,000 dols. to 17,000 dols. to place her in repair. Messrs. Houdlette & Co. agree to take my draft at ninety days' sight on Messrs. Baring Brothers & Company, of London, at the rate of five per cent. discount for the amount of repairs on my vessel, together with a bottomry bond on ship, cargo and freight, as collateral security. Should you not approve of this, please advise by wire through Messrs. Baring, Brothers & Co., of London, being the readiest mode in which intelligence can be conveyed to this island. It will take at least ten days more to discharge, and probably twenty to twenty-five days in repairing, and at least one month to re-load. You will therefore have ample time for addressing me by letter. In the meantime a faithful and proper attention shall be paid to all the work and expenditure as far as lays in the power of

"Your humble servant,

"(Signed) "James H. Hewitt."

On the same 29th of June Messrs. Houdlette & Co. wrote to the Findlay house, at Moulmein, as follows:—

"Mauritius, 29th of June, 1870.

"Messrs. Todd, Findlay & Co., Moulmein.

"Dear Sirs,—We hereby beg to advise you that the American ship *Onward*, Captain Hewitt, from your port with timber for Europe, put in here on the 11th inst. in distress, having experienced heavy weather between the southern point of Madagascar and the African coast.

"She has been surveyed and found making four inches of water an hour, her main and mizen masts badly sprung, and pall-bit beam broken.

"Her cargo is now nearly discharged, and she will go into dock in a few days, where she will have to be stripped, caulked, and re-coppered, and her broken masts and beam replaced by new.

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"By next opportunity will be able to give you further particulars, and thanking you for your fortnightly circulars regularly received from Rangoon, remain,

"Dear Sirs, your obedient servants,

"(Signed) "Houdlette & Company."

And on the 30th of June Messrs. Houdlette and & Co. wrote to the Findlays at Glasgow pretty much to the same effect. It was as follows:

"Mauritius, June 30th, 1870.

"T. D. Findlay, Esq., Glasgow.

"Dear Sir,—We hereby beg to advise you that the American ship *Onward*, from Moulmein, with timber, for Cork or Falmouth, for orders, put in here on the 11th inst. for repairs, she having experienced bad weather between the southern point of Madagascar and the African coast."

The letter is pretty much the same, and ends in this way:

"We think that she will be detained here about two months longer to finish discharging, make the necessary repairs, and reload, and her expenses here will amount to about 4000*l*."

And then there follows these words:

"By next opportunity we shall be able to give you more particulars, and in the meantime remain,

"Dear Sirs, your obedient servants,

"Houdlette & Company."

On the 1st of July, that is, the day after, and practically by the same post, Messrs. Houdlette wrote to Messrs. Poillon as follows:—

"Mauritius, 1st July, 1870.

"Messrs. C. & R. Poillon, New York.

"Dear Sirs,—We hereby beg to advise you that your ship *Onward*, Captain Hewitt, from Moulmein, with timber for Cork or Falmouth, for orders, put in here on the 11th ultimo in distress, having experienced heavy weather on the 31st of May in latitude 29° 49′ south, longitude 43° 49′ east, causing her to spring a leak.

"She has been surveyed and found to be making about four inches of water an hour in our harbour, her main and mizen masts badly sprung and pall-bit beam broken, and some of her sails

gone. The surveyors recommended her cargo to be discharged in order to lighten the ship for further examination, and now that the cargo is nearly out the leak continues the same as when she was first surveyed, and she has, therefore, been recommended to go into dock and be stripped, caulked, and re-coppered, and her masts and beams broken to be replaced by new, which we think will detain the ship about two months longer with the re-loading of the cargo, and will cost about (4000*l.*) say four thousand pounds sterling."

What follows, it will be seen, was not inserted in the letter to Messrs. Findlay, of Glasgow, on the 30th of June.

"And for the purpose of procuring funds for the payment of these repairs, we have proposed to Captain Hewitt to take his draft on Messrs. Baring Brothers & Co., of London, drawn at ninety days' sight at five per cent. discount, with a bottomry bond on ship, cargo, and freight as collateral security, with the understanding that the bond be null and void provided the draft be accepted; and should you approve of this proposal you will please place in the hands of Messrs. Baring Brothers & Co. sufficient funds to meet the draft upon presentation.

"Captain Hewitt will write by this opportunity and give you all the particulars of his case, and by the mail leaving on the 29th inst. we shall be able to inform you of further progress, and in the meantime remain,

"Dear Sirs,

"(Signed) "Houdlette & Company."

It may be observed here that the first mail for Glasgow left the Mauritius on the 1st of July, and would arrive at Glasgow about the 30th, so that in fact the letter of the 30th of June to Messrs. Findlay at Glasgow, and that to Messrs. Poillon on the 1st of July, left the Mauritius on the same day.

On the 25th of August Messrs. Poillon wrote to Messrs. Findlay, of Glasgow, as follows:—

"C. & R. Poillon, New York, 25th August, 1870.

"Messrs. T. D. Findlay & Co., Glasgow, Scotland.

"Gentlemen,—By the inclosed copies of letters received from Captain Hewitt and Messrs. Houdlette & Co. you will perceive that the ship *Onward*, under charter to yourselves, has been com-

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pelled to put into Mauritius in distress, and will probably be detained there for two months or more for repairs. The information contained in the letters is all the particulars we have of the disaster. If we should obtain anything further of importance will advise by first opportunity after receipt.

"Your obedient servants,

"C. and R. Poillon, per E. H. Gibbs."

The inclosures referred to were the letters of the 29th of June from the master and the 1st of July from Houdlette & Co. to Poillon & Co. at New York. That letter of the 25th of August would in course of post be delivered at Glasgow on the 8th of September. By the inclosures Findlay was for the first time apprised that it had been proposed to the master to take a bottomry bond affecting the cargo: this being recited in the passage of the letter which was omitted in the letter of the 30th of June from Houdlette & Co. to Findlay.

The post could have brought no answer from Glasgow to the Mauritius which could arrive there before the 3rd of November; the communication by telegraph would, if no obstacle had occurred, have occupied from twelve to fourteen days—that is, ten to fourteen hours by telegraph to Aden, and ten to thirteen days by mail steamer to the Mauritius. The *Onward* sailed from the Mauritius on the 15th of October. Two mails elapsed before Houdlette & Co. wrote again to the Findlays at Glasgow. On the 18th of September they sent the following letter:—

"Mauritius, 18th Sept., 1870.

"T. D. Findlay, Esq.

"Dear Sir,—Since writing you on the 30th June" (there is all that interval) "the *Onward* has come out of dock and has now finished her repairs, but the stevedores do not appear to understand the work of stowing timber, and the labour of taking in the cargo seems to drag, but the captain hopes to have finished in about two weeks, and we hope to see the vessel away soon after.

"The *Onward* has been very thoroughly repaired, and we believe her to be a good strong ship, and Captain Hewitt has left nothing undone to push forward the work as fast as possible."

And the letter ends as follows:—

"With nothing of importance to add, we remain,

"Dear Sir,

"Your obedient servants,

"Houdlette & Company."

They wrote to the same effect to the Findlays at Moulmein on the same 18th day of September. There is no mention in this letter of any intention to subject the cargo to bottomry.

On the 19th of October they wrote the following letter to the Findlays, at Glasgow, and the Findlays at Moulmein:—

"Port Louis, Mauritius, 19th Oct., 1870.

"T. D. Findlay, Esq., Glasgow.

"Dear Sir,—We last had this pleasure on the 18th ultimo, and now beg to inform you that the *Onward* got away on the 15th instant, having taken all of her original cargo outward with the exception of seventy-seven pieces, which were shut out for want of room, and have been shipped on board the ship *Warren Hastings*, bound for London.

"The disbursements of the *Onward* amounted to about 25,000·00 dollars, and we have taken the captain's draft on Messrs. Baring Brothers & Co. at five per cent. discount for the amount of same, and a bottomry bond on ship, freight, and cargo as a collateral security, which will be made null and void upon payment of the draft.

"Trusting that this vessel will arrive at her port of destination in safety, we remain, dear Sir,

"Your obedient servants,

"Houdlette & Company."

And in this letter, for the first time, the Findlays were apprised by Houdlette & Co. that their cargo had been bottomried, though even then as a collateral security to the draft on Messrs. Baring: the ship having sailed, as I have already stated, on the 15th of October.

No intimation was conveyed either in this letter or in that of the 1st of July, enclosed in that of the 25th of August, that the Poillons had not placed (as it had been suggested by Houdlette in the letter of the 1st of July) in the hands of Messrs. Baring Brothers & Co. sufficient funds to meet the draft upon presenta-

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tion; and indeed they had not made up their minds not to do so until the 6th of January, 1871. In their letter to Messrs. Baring from New York of the 21st of September they say, "We are not desirous of advancing the money spent at Mauritius, unless by doing so we can make a saving, and for that reason would thank you on receipt of the documents, and before you accept or pay the bond, to get your average stater to make a rough estimate that will shew how much the ship will have to pay after deducting from the total amount due under the bond (if promptly paid) such sums as the cargo and underwriters on freight will have to pay, and telegraph the result to us by cable; and we would like the amount also due from the ship classified, so as to shew how much the underwriters on vessel would have to pay and how much would fall on the owners: with these two items before us can determine whether or not it is desirable for us to advance the money or let the vessel be sold to pay the bond."

And on the 6th of January they wrote as follows:—

"Captain Jas. H. Hewitt, London.

"Dear Sir,—We have received your letters from Mauritius, and we have also received the papers from Messrs. Houdlette & Company, and after full examination have concluded not to take up the bottomry bond on the ship *Onward*, and we have so informed Messrs. Baring Brothers and Company. Will you communicate by telegraph to us yourself immediately on the arrival of the ship at port of discharge, and oblige

"Your obedient servants,

"C. & R. Poillon."

It was admitted by the counsel for the bondholder that the conduct of Messrs. Poillon in this matter was very reprehensible; but it was at the same time contended that with this conduct the bondholder had no concern, and ought not to suffer on account of it.

To these facts I will now endeavour to apply the law.

And first as to the objection to the validity of the bond on the ground that it was a collateral security only to the bill of exchange, which had not been presented or protested.

In support of this proposition the case of *The Staffordshire* (1),

(1) Law Rep. 4 P. C. 194.

recently decided by the Privy Council, was cited. I have considered that case, and I am of opinion that it does not warrant the conclusion sought to be derived from it. The bond in this case was to be cancelled, as the evidence shews, on the prompt payment of the bills, and otherwise to be enforced.

There was no prompt payment. The Messrs. Poillons never provided the Messrs. Baring with the requisite funds. The bills came home and were, in fact, duly presented. They were not protested, because the drawer, the captain, had no money in the hands of Messrs. Baring, and no notice of dishonour was necessary therefore to be given.

In the case of *Stainbank* v. *Shepard* (1), decided by the Exchequer Chamber in 1853, the judges, referring to the cases in the Admiralty Court, say, "We must not be supposed to intimate a doubt that a bottomry bond may not be given at the same time with, and as a collateral security for, bills of exchange drawn on the owner."

It was argued that the Messrs. Baring took up these bills, but the evidence of Mr. Theobald with respect to their mode of transacting business of the kind satisfies me that this statement was incorrect. Upon the whole I am clear that the contention that the bottomry bond is not invalid upon the grounds that the bills of exchange have not been presented or protested cannot be sustained.

According to the law, the master is always the agent for the ship, and in special cases of necessity the agent for the cargo also.

He is the appointed agent to the former, the involuntary agent of the latter. From these principles of jurisprudence two important consequences flow.

First, when the circumstances permit the master must communicate with the owner before he does any acts which seriously affect the value of the ship in the one case or of the cargo in the other.

This is a doctrine at which the English Courts have slowly but steadily arrived.

That communication was necessary in the circumstances of this

(1) 13 C. B. 418; 22 L. J. (Ex.) 341.

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case I have no doubt whatever, notwithstanding the arguments to the contrary which were addressed to me.

The cargo was timber not of a perishable character; it belonged to one firm. The owner might well have thought it for his interest either to advance the requisite funds for the repairs or to pay the full freight and to embark it in another vessel; the rate of freight for such timber was low at the Mauritius. As it is, he will, if the bond be pronounced for, when demands having claims of priority have been satisfied, have to pay nearly if not the whole sum of 5130*l.*, his liability for freight being 2338*l.* It has been said that he is not really injured, for by another action in another court he may recover from the shipowner what he now pays to the bondholder. This operation, however, is not unattended with expense and delay where the shipowner is solvent and dwells in this country; but in the present case, though there be no reason to doubt his solvency, he is domiciled at New York, and I cannot discover that the doctrine of the English decision in *Duncan* v. *Benson* (1) has ever been judicially recognized in that country. A communication was therefore, in my opinion, indispensable in the circumstances of the case to the validity of a bottomry bond on the cargo. It has been argued, however, that a communication, though not necessary, was in fact made, and this is the next point to consider.

Connected with this consideration, is the allegation that Findlay was negligent, that he chose to fold his hands and lie by doing nothing. It does not seem to me that he was negligent. The master, his agent from the necessity of the case, never wrote to him at all. The agent of the ship wrote indeed on the 1st of July to the owner of the cargo, suppressing to the latter the fact that he urged a bottomry bond on the cargo, which he revealed to the owners of the ship. The letter of the 25th of August from Poillon which he received on the 8th of September, contained the first intimation of the bottomry bond. And then Findlay was informed that the ship would probably be detained only two months, dating from the 1st of July. As it happened, by the use of telegraph and mail, a message might have arrived before the vessel sailed on the 15th of October. But even this was matter of uncertainty, and if

(1) 3 Ex. 644; 18 L. J. (Ex.) 169.

such letter had arrived the bond, though not literally signed, had been long ago determined upon, and a bargain made upon the faith that it would be duly executed.

It is not impertinent to the question of the sufficiency of the communication to remember that in this peculiar class of cases, in which the interests of absent principals may be so seriously affected, the law has considered that the lender as well as the borrower has some duty to discharge. He is bound to make a reasonable inquiry as to the necessity which authorizes the master to hypothecate. Now the lenders in this case, Houdlette & Co., were the agents of the ship. "They represented me," the master says, when asked if the repairs were not done on their credit; and it appears to me, from the correspondence to which I have already adverted, that from a very early period, before the cargo was fully discharged, before the expenses necessitated by the repairs were accurately known, before an attempt had been made to raise funds on the personal credit of the owners, whom they knew to be affluent merchants at New York, before any attempt had been made to raise money on the ship and freight, Houdlette & Co. suggested to the master and advised him to give a bottomry bond on the cargo as well as the ship and freight, as a collateral security indeed to his draft on Messrs. Baring & Co.;—and here I must observe, once for all, that the name of this great and much-esteemed commercial firm, the present bondholder, was put before me as if of itself an argument against any want of bona fides in this transaction, but I am of opinion that I must consider this case as if Messrs. Houdlette & Co. were still the holders of the bond which has been transferred to Messrs. Baring. Whatever legal infirmities were incident to the instrument while possessed by the former belong to it in the hands of the present owner. Not only did Messrs. Houdlette and Co., as has been already observed, omit in their letters to the owners of the cargo the passage as to the bottomry bond inserted in their letter to the owners of the ship, but they state that by next opportunity "we shall be able to give further particulars," that is, they suggest that Findlay should wait before he answers their letter; and accordingly Mr. Findlay says in his evidence, "We did not answer, as we expected to receive further information as to the position of the ship by the following mail.

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We received no further letter for the next two mails." They did not answer the letter of the 25th of August, but they had no time (he says) to write to the Mauritius, and writing to New York would have been of no avail to stop proceedings at the Mauritius. Moreover, they assumed that Poillon would pay the money into the hands of Messrs. Baring. Findlay says, in effect, that this letter did not raise any alarm as to a bottomry bond on the cargo, because he knew that Poillon was a rich man; indeed, his letter of the 6th of January, 1871, shews that it was not from want of means that he refused to pay the money. As to Houdlette & Co., they allow two mails to go out without further communication to Findlay. On the 18th of September they write that the vessel "has been very thoroughly repaired," and say "they have nothing of importance to add." They are still silent as to the bottomry bond. On the 19th of October, after the ship had gone to sea (which she did on the 15th), they make the first communication from the Mauritius to Findlay that the cargo has been bottomried.

If a communication was necessary, and a proper communication was not made, I do not think that the absence of it can be excused on the ground of the laches of the owners of the cargo. In the case of *The Oriental* (1), the owner of the ship resided at St. John's, New Brunswick. The ship was at New York when the necessity for her repairs arose. New York was distant 600 miles from St. John's, and between the cities there was a communication by electric telegraph. The agent of Wallace at New York telegraphed to him that his ship had been ashore, was leaky, and was discharging her cargo. An answer came by telegraph from Wallace acknowledging the receipt of the message, saying he should be glad to hear by telegraph when necessary. Three days after the agent wrote by post a general description of the injuries sustained by the ship, that a survey was to be holden, and he would then report what injury she had sustained; that the expenses would be considerable, but as the cargo was valuable, would not fall so heavily on the ship. About a week after this the captain wrote to Wallace particulars of the damage, and about a week after that the agent wrote again to Wallace. In none of these communications was it directly said that a bottomry bond would be necessary. About the time of the last letter, however, the agent spoke to the

(1) 7 Moo. P. C. 398.

captain about a bottomry bond, to which the captain first objected, but afterwards agreed, on the agent saying he would write to Wallace. The captain made no communication to the owner as to the proposed bottomry bond. Some days after the agent wrote to Wallace by post to say he had taken a bottomry bond, which he appears to have done three days before Wallace could have received the letter in due course of post. The owners of the ship and the cargo opposed the validity of the bond. Dr. Lushington, however, pronounced for it, holding that the evidence established the necessity for it, and that the agent was not bound to have telegraphed before he took the bond. The Privy Council reversed the sentence, on the ground that there had not been communication with Wallace, the owner.

Sir John Jervis said (1): "There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence, which must be taken to be the proper mode or channel of communication, not to send money, as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand, and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no authority in the master to raise money on bottomry." In the opinion, therefore, of this Appellate Court, whose decisions are binding upon me, a mere statement of injuries done to the ship, and of the consequent necessity of repairs, which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners. The law did not require them from these premisses to draw the conclusion that the ship and cargo must of necessity be bottomried. It may not require that the words bottomry of cargo should be used, but it requires that the fact itself should be stated, or, at least, that it should be an obvious and irresistible influence from circumstances stated. The owner, as the Privy Council said in *The Panama* (2), should duly receive notice of the intention to raise money by bottomry. Now,

(1) 7 Moo. P. C. C. at p. 411. (2) Law Rep. 3 P. C. 199.

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in the present case, the circumstances relating to the state of the ship, recited in the communication to the owners of the cargo, were certainly not stronger—I should say they were less strong—than those which existed in the case of *The Oriental.* (1) In both cases the owner was led to expect further communication, and in the case before me there is this further fact continually presenting itself, namely, that the necessity for the bottomry bond stated by the lender in the communication to the owner of the ship was suppressed in that which was made to the owner of the cargo, to whom the master never wrote at all. On the other hand, the case of *The Bonaparte* (2) was cited to establish the proposition that if the owners of cargo had ample information of the disasters which had befallen the vessel, there was a sufficient communication. But an examination of the communications made in that case to the owners enables me to reconcile the judgment in it with the preceding case of *The Oriental.* (1) In that case the owners of the cargo were specially apprised of the injury done, not only to the ship but to the cargo, and, moreover, their advice was specially requested as to what in the circumstances it would be best to do, and it was holden that as they chose to pass by the whole matter in silence and give no instructions, when instructions had been particularly and immediately requested, the communication was sufficient. In the case of *The Lord Cochrane* (3), decided in 1844, before the law as to the necessity of communication had been distinctly laid down, Dr. Lushington said: "I now come to another point in the case which has been much commented upon, viz., the conduct of the master with reference to the shippers of the cargo. It has been said that it was the duty of the master, before he gave a bottomry bond upon the cargo in this case, to have communicated with the shippers in the first instance, and to have taken their directions; this observation, it is obvious, must be subject to great limitations under the circumstances of the case. The shippers, it is to be noticed, were resident on the spot; and it is perfectly true, that if they had been kept in ignorance of the intended bottomry transaction, it would have been a strong argument against the bona fides of the master that he had not put himself into communication with them.

(1) 7 Moo. P. C. 398. (2) 8 Moo. P. C. 459.
(3) 2 W. Rob. 320, at p. 333.

It is obvious, however, in the present instance, from the facts spoken to in the affidavits, that these shippers must have been cognizant of the transaction in question, and if they had deemed it expedient for their interests to interfere for the protection of the cargo, they had the opportunity, and were at perfect liberty so to do. It appears, however, that only one or two of these individuals, and those possessing the slightest degree of interest, in any manner interfered, or took any share in the matter. In my opinion this indifference was a mutual acquiescence in the master's proceedings, and is much the same thing as if a communication had taken place between the master and themselves, and their answer had been—We will have nothing to do with the matter, you must act according to your own discretion."

Having regard to the principle upon which communication is required, and the authorities upon the subject, and applying them to the particular facts of this case, I am of opinion that the communication was insufficient, and did not satisfy the law. And here I might end my judgment, but I desire to say a few words upon the remaining question of law which arises in this case. The next consequence from the doctrine of agency is that the master must sustain to the best of his power the interests of the absent owner. This is a principle of general maritime law, and not like the former one, of English law only. Boulay Paty observes: "Il est le représentant des chargeurs absens; il doit faire ce qu'ils feraient eux-mêmes s'ils étaient sur les lieux:" Cours de Droit Commercial Maritime, tom. 2, p. 404, ed. 1834—that is, he must do that which there is fair reason to suppose the owner, if present, would do. "Il est donc" (Emerigon says) "obligé de faire ce qu'il est à présumer que feraient les chargeurs s'ils étaient présens," quoted by Boulay Paty, Cours de Droit Commercial Maritime, tom. 2, p. 403, ed. 1834.

The master is to remember the foundation of his authority to give a bottomry bond on cargo is the prospect of benefit, direct or indirect, to the proprietor of it. This principle limits the authority of the master in this matter. He may sell a part of the cargo, but not the whole. Why? Because the former act may be, the latter cannot be, for the benefit of the proprietor. The interests of which he is respectively guardian may be conflicting, and in this case he

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must do what is best for the whole adventure. He must endeavour to accomplish the contract between two parties whom, for the occasion, he represents for the common benefit of ship and cargo; and, therefore, as in the case of the sale he may not sell the whole cargo, so neither may he do what is in effect the same—repair the ship at the sole expense of, and without reasonable probability of benefit to, the cargo. "It is, therefore, true," Lord Stowell says, "that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs": *The Gratitudine.* (1) The prospect of benefit must be such as a man of ordinary prudence and knowledge of the subject would in the circumstances entertain. The master must endeavour to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo or the cargo to the ship. In this case the outlay on the ship which the cargo is to pay is very great. The master is asked "whether by the repairs she was made as good a ship as she was at the outset." He answers, "Better ship than she was the day I took her." I do not think upon the evidence before me that a reasonable and prudent owner, if present, would have allowed his cargo to be bottomried for such very extensive repairs. He would rather have paid the freight and re-shipped the goods. I do not, however, decide the case on this ground alone, but having regard to the circumstances already mentioned, and to the fact that the agent of the ship being also the lender, while he communicated to her owners the intention to take a bottomry bond affecting the cargo, omitted that fact in the contemporaneous letter which he wrote to the owner of the cargo; in which letter, telling him only of the disaster to the ship, he promised further information, which he himself never sent till the vessel had sailed, and which through no channel reached the owner of the cargo till practically too late, I decide that there was not in this case such a communication to the owners of the cargo as the law in these circumstances could require. And I pronounce, therefore, against the validity of the bond, with costs.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Rawle.*
Proctors for defendants: *Pritchard & Sons.*

(1) 3 C. Rob. 240, at p. 261.

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March 18, 19, 20, 21; May 7.

Jurisdiction of the Court to entertain a Suit of Damage instituted against a Vessel belonging to the Khedive of Egypt—Sovereign Prince—Maritime Lien—Proceedings in Rem—Waiver of Privilege.

In a cause of damage instituted by the owners, master, and crew of the *Batavier* against the vessel *Charkieh* and her freight, an appearance under protest was entered on behalf of His Highness the Khedive of Egypt and his Minister of Marine. A petition on protest was filed on their behalf, stating that the *Charkieh* was the property of the Khedive as reigning sovereign of the state of Egypt, and a public vessel of the government and semi-sovereign state of Egypt, and concluding with a prayer to the Court to declare that the vessel was not liable to arrest. It appeared from the answer filed on behalf of the plaintiffs, and from evidence which was adduced at the hearing of the petition on protest, that the *Charkieh*, though carrying the flag of the Ottoman navy, had come with cargo to England and had been entered at the Customs like an ordinary merchant ship, and that, at the time of the collision, which happened in the Thames, she was under charter to a British subject and was advertised to carry cargo to Alexandria:—

The Court held that the Khedive was not entitled to the privilege of a sovereign prince, and pronounced against the protest:—

Semble, that a suit in rem to enforce a damage lien may be entertained without any violation of international law, though the owner of the res be the sovereign of a foreign state, and that such a suit may possibly be entertained even against property connected with the jus coronæ:—

Semble, that if a sovereign assumes the character of a trader, and sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a sovereign.

THIS was a cause of damage instituted on behalf of the Netherlands Steamship Company, the owners of the steamship *Batavier*, and the master, crew, and passengers thereof, proceeding for their private effects, against the screw steamship *Charkieh* and her freight for the recovery of damages in respect of the total loss of the *Batavier* by reason of a collision between the two vessels in the Thames on the 19th of October, 1872. The cause was entered on the 21st of October in the sum of 20,000*l.*, and the vessel arrested on the same day in the port of London. On the 12th of November, no appearance having in the meantime been given on the part of any defendant, an application was made to the Court of Admiralty by counsel on behalf of the plaintiffs for leave to

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file a petition in general terms, with liberty to amend on an appearance being entered, but the judge, on a representation being made that the *Charkieh* was a vessel belonging to the Royal Ottoman navy, adjourned the application, and directed the registrar to communicate with the Ottoman ambassador. The Assistant Registrar accordingly, under the direction of the Court, wrote the following letter:.

"Admiralty Registry, Doctors' Commons,
"12th November, 1872.

"Your Excellency,

"I am directed by the judge of the High Court of Admiralty to apprise you that a cause of damage on behalf of the owners of a vessel called the *Batavier* has been instituted in this Court against a vessel called the *Charkeish* or *Charkieh*. The judge having received an intimation that the vessel so proceeded against is alleged to belong to the royal navy of the Ottoman Empire, and therefore not amenable to the jurisdiction of this Court, desires that your excellency should be informed of the institution of the suit in question in order that the proper legal steps may be taken for establishing the fact that the vessel does belong to the Ottoman navy if such should be the case.

"I have the honour to be, &c.,
"H. A. Bathurst, Assistant Registrar.

"His Excellency Musurus Pacha, Ambassador
Extraordinary and Plenipotentiary from the
Ottoman Empire, 1, Bryanstone Square."

No reply was received to the letter, but before any further order was made by the Court of Admiralty the Court of Queen's Bench was applied to on behalf of His Highness Ismail Pacha, Khedive of Egypt, and granted a rule calling on the judge of the Admiralty Court and the owners of the *Batavier* to shew cause why a prohibition should not go to restrain further proceedings in the cause, on the ground that the *Charkieh* at the time of the collision was an Egyptian government vessel, and therefore, as the property of a foreign state, not amenable to the jurisdiction of the Court of Admiralty. On the 23rd of January, 1873, the Court of Queen's Bench, after hearing arguments, discharged the rule (1),

(1) See Law Rep. 8 Q. B. 197.

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and subsequently an appearance under protest was given on behalf of His Highness Ismail Pacha, the Khedive of Egypt, part the owner of the *Charkieh*, and Admiral Latif Pacha, Minister of Marine for the government of Egypt, who, as defendants under protest, filed a petition on protest, which was in substance as follows:—

2. Before and until the year 1870 the *Charkieh* was the property of an Egyptian trading company. In the said year 1870 the said company was dissolved.

3. At the time of the dissolution of the said company, and in the said year 1870, the *Charkieh* was purchased by the Egyptian government. From the time of the said purchase until and at the time of the collision hereinafter mentioned, and thence until and at the time of the institution of this suit and the arrest of the said steamship therein, the *Charkieh* has always been and still is the property of His Highness Ismail Pacha, the Khedive of Egypt, as reigning sovereign of the state of Egypt, and during all the time aforesaid has been and still is a public vessel of the government and semi-sovereign state of Egypt.

4. From the time when the *Charkieh* became the property of His Highness the Khedive, as sovereign prince of Egypt, as hereinbefore alleged, the said steamship has been and still is a ship of the Egyptian branch of the Imperial Ottoman navy, and is entitled to carry and does use and carry the Ottoman naval pendant, and the Ottoman naval ensign, which are used by all the ships of the Egyptian navy, as distinguished from Egyptian merchant vessels.

5. The *Charkieh* is officered by Egyptians, with the exception of an acting commander, sailing-master, and engineers, who are Europeans. The said Egyptian officers hold commissions from His Highness the Khedive, and are in the naval service of the Egyptian government. The said European officers are respectively under contracts to serve the Egyptian government.

6. All the said officers and crew of the *Charkieh* are appointed by and are under the control of the defendant under protest, Latif Pacha, as Minister of Marine of the said government of Egypt, and the said steamship is ordinarily and was at the time of her said arrest under the orders and control of the said Minister of Marine. For some time before the *Charkieh* left Egypt for England as hereinafter mentioned, the said steamship was under the control and orders of the Egyptian Minister of the Interior, and was employed by him as a government packet, carrying the mails and passengers and cargo, between Alexandria and Constantinople.

7. In the month of September, 1871, the *Charkieh* was despatched from Alexandria to England, for the purpose of being repaired, and the defendant under protest, Latif Pacha, as such Minister of Marine, issued under his seal proper credentials as to her ownership and the service upon which she was engaged. The said credentials are contained in a document annexed hereto.

8. For the purpose of lessening the expense occasioned to the Egyptian government, by sending the *Charkieh* to England as aforesaid, certain cargo was brought by the said steamship to England. With the same object the said steamship had, before her arrest in this suit, been advertised as about to sail from London to Alexandria carrying cargo.

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9. All freights and passage money whatever which the *Charkieh* has earned in the aforesaid employment as a packet of the Egyptian government or on her voyage to England have been and are ultimately received by and accounted for to the said Minister of the Interior of Egypt, and form part of the public revenues of Egypt. Any freight earned by the said steamship on her said return voyage to Alexandria will be in the same way received on account of the said Minister of the Interior.

10. On or about the 19th day of October, 1872, the *Charkieh*, which had completed her repairs and was returning from a trial trip of her machinery, came into collision with the said steamship *Batavier* in the River Thames.

11. On or about the 21st day of October, 1872, this cause of damage, No. 6200, was instituted in this Honourable Court on behalf of the Netherlands Steamship Company, the owners of the said steamship *Batavier*, and others, against the said steamship *Charkieh*. On the same day the *Charkieh* was arrested by virtue of a warrant issued out of this Honourable Court, and has since remained and still remains under such arrest.

And the solicitors for the defendants under protest pray the Right Honourable the Judge to declare that this Honourable Court has no jurisdiction to entertain this suit, and that the plaintiffs cannot prosecute the same therein, and that the said steamship is not liable to the arrest and process of this Honourable Court, and to order the said ship to be released from such arrest, and to dismiss the said suit and to condemn the plaintiff therein in the costs of these proceedings.

The following is a copy of the document referred to in the 7th article of the petition:

Ministère de la Marine Égyptienne.

Avis.

Le bateau à vapeur *Charkiéh* appartenant au gouvernement Khédivié du port de 1615 tonneaux, de la force de 350 chevaux et à deux mâts, part ce jour d'Alexandrie pour Londres, sous le commandement du capitaine Jovani Anderlich, par ordre de Son Altesse le Khédive pour y être réparé, et suivant ordre qui nous a été donné, nous avertissons le public du départ du dit bateau sous pavillon de l'Empire Ottoman.

Nous prions tous officiers civils et militaires de tout État ami ou allié, tous fonctionnaires et tous autres, qu'il leur appartient de donner secours et assistance partout où besoin sera, selon ce qu'exigent les règlements de la marine durant ce voyage aller et retour et pendant le séjour du dit bateau à Londres.

Alexandrie, ce Jeudi, 29 Gamed Arer, 1288, où 14 Septembre, 1871.

(Signé) Latif Pacha,
Ministre de la Marine Égyptienne.

The plaintiffs in their answer denied all the allegations contained in the petition on protest, with the exception of the averments in the 10th article, and alleged as follows:—

2. The steamship *Charkieh* proceeded against in this cause is built, fitted, and equipped solely for the purpose of carrying cargo and passengers, and not in any way as a ship of war, and before and until the year 1870, and whilst she is alleged

by the defendant to have belonged to an Egyptian trading company, she was used for the purpose of trade and profit as a merchant vessel, and the said ship was from the time when she is alleged by the defendant to have been purchased by the Egyptian government and until she was despatched from Alexandria in the month of September, 1871, used in like manner by her owners whomsoever for the purpose of trade and profit as a merchant vessel.

3. Before the *Charkieh* was despatched from Alexandria in the month of September, 1871, for this country, she was put up at Alexandria by the owners whomsoever in the ordinary way as a general ship to carry cargo to London, and a large quantity of cargo was shipped on board her at Alexandria by divers persons, and accepted by her master and owners whomsoever for carriage to London for freight to be paid for such carriage, and bills of lading for such cargo of an ordinary mercantile character, containing provisions and stipulations for the protection as well of the shipowner as of the owners of the goods were in the ordinary way signed and delivered by or on behalf of her owners whomsoever.

4. The *Charkieh* came to England with her said cargo as and upon the footing of an ordinary merchant vessel, and neither the master of the *Charkieh* nor her owner whomsoever at any time until after she was arrested in this suit claimed that she should be treated otherwise than as an ordinary merchant vessel, and she was in fact treated, and by her master and owners whomsoever without objection suffered to be treated, in all respects as an ordinary merchant vessel, and on her said arrival she received on board her British Custom House officers in the usual way as a merchant vessel, and was reported inwards by her master, and paid light, and tonnage, and other dues in the ordinary way as a merchant vessel.

5. At the time of the collision between the *Charkieh* and the *Batavier* in the said petition mentioned, the *Charkieh* had been entered outwards at the Custom House in the ordinary way as a merchant vessel, to load cargo for Malta and Alexandria as a merchant vessel, and had been put and publicly advertised with the authority of her owners whomsoever as one of a regular line of vessels to carry goods and passengers to Malta and Alexandria. The exhibit hereto annexed marked "A" is a true copy of such advertisement. The *Charkieh* had on board at the time of the said collision a quantity of cargo which had been laden on board her for carriage to Malta or Alexandria on her said then proposed voyage, and which was being used to ballast her on her trial trip in the said petition mentioned.

6. The plaintiffs submit that even if the *Charkieh* was at the time of the said collision the property of the Khedive or the government of Egypt, yet that she is subject to the jurisdiction of this Honourable Court, and liable to process in this suit.

7. The plaintiffs further allege and submit that his Highness Ismail Pacha, the Khedive of Egypt, as reigning sovereign of the semi-sovereign state of Egypt, is not such a reigning sovereign as to entitle him or the government of Egypt to have accorded to the *Charkieh* by the comity of nations or otherwise the privileges or immunities of a public vessel of war of an independent sovereign or state or the privilege of freedom from arrest and process in this suit.

And the solicitors for the plaintiffs pray the Right Honourable the Judge to overrule the protest of the defendant to the jurisdiction, with costs.

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The following is the exhibit referred to in the 5th article of the answer:

"A."

Regular line of screw-steamers to Malta and Alexandria.

Will be promptly despatched to follow the *Mahalla*, the remarkably fine, first-class screw-steamer

Charkieh, A 1,

for

Malta and Alexandria.

Has excellent accommodation for passengers.

1167 tons register. 1200 horse-power.

John Anderlich, commander. Loading in Millwall Dock.

All goods received by special agreement, and must be sent alongside at least two clear days before the date of clearing, and must be distinctly marked with the name of the port for which they are destined, or the ship will not be responsible for the delivery of the same. Barges will be unladen as quickly as possible to suit the convenience of stowage, but if delay occurs, from any cause whatever, the owners will not be responsible for detention of craft. Engagements of goods are subject to there being room in the vessel when they come alongside.

For freight or passage apply to W. E. Bott and Co., 9, Billiter Street; or to G. L. Jackson and Sons, 18, Billiter Street.

Mate's receipts (if any) required in exchange for bills of lading, which must be obtained of Cookes and Lloyd, 51, Fenchurch Street.

The following reply was filed on behalf of the defendants:

1. Save as appears by the petition on protest filed in this cause, they deny the allegations contained in the paragraphs 2, 3, 4, 5 and 7 of the answer of the plaintiffs thereto.

2. Referring to paragraph 4 of the said answer, they say that after the arrival of the *Charkieh* in England in the year 1871, and long before the collision between the *Charkieh* and the *Batavier* in the petition mentioned, application was made on behalf of His Highness the Khedive of Egypt to the Lords Commissioners of the Admiralty of our Sovereign Lady the Queen to appoint a surveyor to supervise the repairs of the *Charkieh* as being an Egyptian government vessel and not an ordinary merchant ship, and that the said Lords Commissioners recognising the *Charkieh* as a vessel of the Egyptian Government as aforesaid, appointed such a surveyor, and the repairs of the *Charkieh* were effected under his supervision.

3. They submit that the allegations in paragraphs 2, 3, 4, and 5 of the said answer of the plaintiffs in this suit do not, if they are true, shew that this Honourable Court has jurisdiction to entertain this suit, or that the said plaintiffs can prosecute the same therein.

A conclusion was then filed for the plaintiffs denying the truth of the allegations in the 2nd article of the reply, and maintaining that the same were irrelevant and immaterial.

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The cause came on to be heard on the 18th of March, and the hearing was continued on the 19th, 20th, and 21st of March.

Butt, Q.C., Cohen, and *Gibson,* appeared for the defendants in support of the protest.

Milward, Q.C., and *E. C. Clarkson,* in opposition.

Witnesses were examined orally before the Court, but the result of their evidence is sufficiently stated in the judgment.

Butt, Q.C. First: the international status of the Khedive of Egypt is that of a sovereign, and for the purposes of this case he must be considered as entitled to all the rights, privileges, and immunities of a sovereign. The truth of this proposition is not matter of evidence, but the Court is bound to take judicial notice of the fact as it really exists: Taylor on Evid. 6th ed. vol. 1, pp. 3, 30; Wheaton, Int. Law, Lawrence's 2nd annotated ed. App. p. 970; *Taylor* v. *Barclay.* (1)

[SIR ROBERT PHILLIMORE. According to the case you cite, the Court ought to cause inquiries to be made at the Foreign Office.]

Yes. It would be presumptuous for the defendants to have offered any evidence on the point. It cannot, however, be denied that the Khedive has been recognised in the courts of this and other countries as a sovereign: *Melanidis* v. *Ismail Pacha* (C. P. June 6, 12, 1866; July 12, 1866; Jan. 16, 1867); the case of *M. Solon* (2); Fœlix, Traité du Droit international privé, l. 2, tit. 2, c. 2, s. 4, tom. i. pp. 393, 394, n. 3me ed.

Secondly: Inasmuch as the Khedive is a sovereign, the rights, privileges, and immunities to which he is entitled here cannot be less than those accorded to a foreign ambassador: Vattel, Law of Nations, edited by Chitty, Book iv. c. vii. s. 108, p. 485; Phillimore, Int. Law, 2nd ed. vol. 2, p. 135; Wheaton, Int. Law, 8th ed, by Dana, ss. 95, 98; Stephen's Blackstone, 5th ed. vol. 2, p. 507.

Thirdly: It is clear from authorities and from decided cases that no Court in this country could have touched the *Charkieh* if she had belonged to a foreign ambassador, for an ambassador is by the law of nations free from any suit in the country to which he is accredited, and his goods are not liable to arrest: *Magdalena Steam*

(1) 2 Sim. 213.

(2) Phillimore's Int. Law, 2nd. ed. vol. 2, 138, 139 (appendix) 616.

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Navigation Co. v. *Martin* (1); Grotius, De jure belli et pacis, lib. ii. c. 18, s. iv. 5; Omnis coactio a legato abesse debet: Grotius, De jure belli et pacis, lib. ii. c. 18, s. ix. 1; Fœlix, Traité du Droit international privé, l. 2, tit. 2, c. 2, s. 4, tom. i. p. 392, 3me ed. Indeed, an analogous privilege has always been granted to foreign sovereigns in this country: *The Duke of Brunswick* v. *The King of Hanover* (2); *Wadsworth* v. *The Queen of Spain* (3); *De Haber* v. *The Queen of Portugal* (4); Wheaton, Int. Law, Lawrence's 2nd annotated ed. p. 199, n.

Fourthly: The privilege of exemption from process which undoubtedly attaches to the character of a foreign ambassador, and therefore to that of a foreign sovereign, is not lost by reason of his trading: *Barbuit's Case* (5); *Magdalena Steam Navigation Co.* v. *Martin* (1); *Taylor* v. *Best.* (6) It is certainly not lost where, as in the present case, the trading, if it exists at all, is merely incidental.

[SIR ROBERT PHILLIMORE referred to the case of *The Emperor of Brazil* v. *Robinson.* (7)]

As to this point, the statute 7 Anne, c. 12, which is merely declaratory of the law of nations, is in point. By that statute the immunity of ambassadors engaged in trade is recognised, and the only limitation of their privileges is contained in the 5th section, which enacts that the servant of an ambassador by trading may lose his privilege. That this section only relates to domestic servants is clear from decided cases: *Barbuit's Case* (5); *Triquet* v. *Bath* (8); *Heathfield* v. *Chilton* (9); *Taylor* v. *Best* (6); *Magdalena Steam Navigation Co.* v. *Martin.* (1)

[SIR ROBERT PHILLIMORE. Vattel and Martens distinctly lay down the proposition that if an ambassador acts as a merchant the goods which he employs in trade may be seized.]

Cohen followed on the same side. Fifthly: the circumstance that the present suit is a proceeding in rem to enforce a damage lien cannot operate to give the Court any jurisdiction which it would not otherwise possess. It is a general principle of inter-

(1) 2 E. & E. 94; 28 L. J. (Q.B.) 310.
(2) 6 Beav. 1; 2 H. L. C. 1.
(3) 17 Q. B. 171; 20 L. J. (Q.B) 488.
(4) 17 Q. B. 196; 20 L. J. (Q.B.) 495.
(5) Cases tempore Talbot, 281.
(6) 14 C. B. 487; 23 L. J. (C. P.) 89.
(7) 5 Dowl. 522.
(8) 3 Burr. 1478.
(9) 4 Burr. 2015.

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national law that no proceeding in any Court here, whether it be in personam or in rem, can be maintained against a foreign sovereign for any delict or tort committed by himself or his servants, and to this proposition there is one exception, namely, that where there is a lien on the property of a foreign sovereign in this country, and the property is in the possession of an English subject, then for certain reasons and certain purposes distinct from those involved in the present case, a restraint may be placed on the property in the hands of such third party: *Gladstone* v. *Musurus Bey* (1); *Munden* v. *The Duke of Brunswick* (2); Notes to *Mostyn* v. *Fabrigas;* Smith's Leading Cases, vol. i. 6th ed. p. 623; *Gladstone* v. *The Ottoman Bank* (3); *Smith* v. *Weguelin* (4); *United States* v. *Wilder* (5); *Larivière* v. *Morgan.* (6) This exception, however, is the only one, and it has never been held that the property of a foreign sovereign, whilst it is in the possession of himself or his servants, is liable to arrest. "The practice of the English courts, both of equity and common law, in this country has been in favour of the privileged exemption of sovereigns in all matters of private contract": Phillimore Int. Law, 2nd ed. vol. 2, p. 135. On general principles, from the reason of the thing, sovereigns must be held exempt equally in cases of crimes, torts, and delicts: Phillimore Int. Law, vol. 2, 2nd ed. p. 132: *Briggs* v. *The Light Boats.* (7) That foreign sovereigns are so exempt from liability is obvious from the very definition of the word law. Can one sovereign command another? If a crime or tort is committed here by a foreign sovereign the courts of this country cannot exercise jurisdiction. It must be remembered that the distinction now drawn between crimes and torts was not formerly regarded, and former writers on international law, in holding that a sovereign prince was not liable to answer for crimes committed by himself or his servants, were in fact maintaining the position that a sovereign was not liable to any foreign jurisdiction. The *Charkieh* is a public vessel of the government of Egypt; and

(1) 1 H. & M. 495; 32 L. J. (Ch.) 155. *Jur. N.S. 71*

(2) 10 Q. B. 656; 16 L. J. (Q.B.) 300.

(3) 1 H. & M. 505; 32 L. J. (Ch.) 228. *Jur. N.S. 246*

(4) Law Rep. 8 Eq. 198.

(5) 3 Sumner U. S. 308.

(6) Law Rep. 7 Ch. 550.

(7) 11 Allen, Massachusetts Rep. 157, 185.

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admitting that she was incidentally trading, she is none the less entitled to immunity from arrest: Ortolan, Règles Internationales et Diplomatie de la Mer, 4me. éd. tom. i. pp. 180—185; *Briggs* v. *The Light Boats* (1); Wheaton, Int. Law, Lawrence's 2nd annotated ed. p. 201. From these considerations, it is clear, that assuming that no action in personam could be brought against the Khedive to recover for damage done by the *Charkieh* when in the possession of his servants, no proceeding in rem against that vessel can be maintained in this Court, for the only object of the maritime lien conferred by damage is to give a security for the enforcement of an obligation, and it has been shewn that no personal obligation binding a foreign sovereign can be enforced in this country: *The Bold Buccleugh* (2); *The Druid* (3); *The Thetis* (4); *The Halley* (5); *The Sappho.* (6)

Milward, Q.C., for the owners of the *Batavier.* Assuming the Khedive to be a sovereign, the decision in the present case mainly depends on the answer to the question, was the *Charkieh* engaged in trade? If she was, and was received into this country as a trader, of which fact there is abundant evidence, no reason has been given why the jurisdiction of this Court over her should be ousted. It cannot surely be contended that the Khedive would not be held liable to pay for salvage services rendered to her, or to an action brought to recover damage done to the cargo on board her. None of the cases relied on by the other side are in point. Here the Khedive has held himself out as a trader, and waived and renounced whatever privileges he might otherwise be entitled to. The true distinction to be drawn from all the authorities is, that the property of an ambassador belonging to him in the capacity of an ambassador is privileged from arrest; but if he deals as a merchant he cannot claim immunity for the property he employs in trade: Vattel, Law of Nations, Book iv. c. viii. s. 114; Klüber, Droit des gens moderne de l'Europe, s. 210; Martens, Précis du Droit des gens moderne de l'Europe, s. 217;

(1) 11 Allen, Massachusetts Rep. 157, 185.
(2) 7 Moo. P. C. C. 267.
(3) 1 W. Rob. 391.
(4) 3 Maritime Law Cases, 357.
(5) Law Rep. 2 A. & E. 3; Law Rep. 2 P. C. 193.
(6) Law Rep. 3 A. & E. 142; Law Rep. 3 P. C. 690.

Phillimore, Int. Law, 2nd ed. vol. 2, p. 215; Bynkershoek, De foro legatorum, cap. xiv. Opera Omnia, vol. ii. p. 165; ed. 1767; Wheaton, Int. Law, Lawrence's 2nd annotated ed. pp. 192, 199. The statute of Anne does not carry the case any further, for it only declares that the person of an ambassador and his goods quâ ambassador shall not be seized; indeed, it is expressly said, in the judgment of the Court in *Taylor* v. *Best* (1), that in many cases a proceeding in rem against the property of an ambassador may proceed, and articles which are unconnected with his personal comfort and dignity may be taken. Can it, however, be said that the Khedive is entitled to the privileges of an ambassador? The Khedive is not a sovereign prince. The case of *M. Solan* (2) is no authority to shew that Egypt was recognised in the French courts as a sovereign state; and a consideration of the convention of July, 1840, by which Egypt was constituted a province under Mehemet Ali (Hertslet's Treaties, vol. v. p. 544), and subsequent events lead to the conclusion that the Khedive is not a sovereign prince: Wheaton, Int. Law, Lawrence's 2nd annotated edition, p. 66; Phillimore Int. Law, 2nd ed. vol. 1, p. 129.

But however high the privileges of the Khedive may be, he is answerable as a private person for any act done here other than in his public capacity: *The Duke of Brunswick* v. *The King of Hanover* (3); Ortolan, Règles Internationales et Diplomatie de la Mer, 4me. éd. tom. i. p. 404; Vattel, Law of Nations, Book iv. c. viii. s. 114; Chitty's ed. p. 492: *Briggs* v. *The Light Ships.* (4) And even assuming that, by the comity of nations, a public war vessel belonging to him would be privileged from arrest, the exemption would not necessarily extend to other vessels, though they might be employed by him on the business of his government: *The Schooner Exchange* v. *McFaddon* (5); *The Santissima Trinidad* (6); Vattel, Law of Nations, s. 113; *Clarke* v. *New Jersey Steam Navigation Company* (7) That such a distinction does exist is shewn by the treaties that have from time to time been entered into between England and other nations for the purpose of securing to mail

(1) 14 C. B. 487; 23 L. J. (C. P.) 89.

(2) Phill. Int. Law, 2nd ed. vol. 2, appendix, 616.

(3) 6 Beav. 1; 2 H. L. C. 1.

(4) 11 Allen, Massachusetts Rep. 157, 185.

(5) 7 Cranch, U. S. Supreme Court Rep. 116.

(6) 7 Wheaton, 283.

(7) 1 Story, 531.

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packets the privileges of vessels of war. (1) It is also apparent that the contrast between an armed national vessel and a government ship engaged in trade was present to the minds of the judges before whom the cases of *The Prins Frederik* (2) and *The Schooner Exchange* v. *McFaddon* (3) were brought.

[SIR ROBERT PHILLIMORE referred to the case of *The Swift*. (4)]

E. C. Clarkson followed on the same side. The defendants rely on two contentions: first, they say that the Khedive of Egypt is an independent sovereign; secondly, that if he is an independent sovereign, the *Charkieh*, as a vessel owned by him, must be held to be exempt from suit in this court. Both these propositions can be controverted. It is admitted that the Khedive of Egypt is without many of the powers and rights usually possessed by sovereigns; that he has no power to send ambassadors, no power to make war; a consul of a foreign nation sent to reside in Egypt obtains his exequatur from the Porte, and without the sanction of the Porte no political treaty can be entered into by Egypt (Twiss, Law of Nations, vol. 1, s. 66, p. 94.) The Khedive has, moreover, failed to shew that, for acts done out of Egypt in other parts of the dominion of the Sultan, he would not be amenable to the jurisdiction of the courts at Constantinople; and if he were amenable to justice there, surely he is amenable to justice here: *Penn* v. *Lord Baltimore*. (5) The defendants have treated the position of a foreign sovereign in this country as analogous to the position of an ambassador, but their positions are not analogous: Woolsey, Int. Law, ss. 92b, 92e. The privilege of an ambassador is the privilege of the sovereign by whom he is sent, and cannot be waived: *Duke of Montellano* v. *Christin* (6); *The Emperor of Brazil* v. *Robinson*. (7) But a foreign sovereign can waive any rights or privileges attaching to his character. Phillimore Int. Law, 2nd ed. vol. ii. p. 181. He can lay down the prince and put on the private man at pleasure: Wheaton Int. Law, s. 101, 8th ed.

(1) Treaty between Belgium and England, 1834; Herstlet's Treaties, vol. 7, p. 81; Belgium and England, 1844; Herstlet's Treaties, vol. 7, p. 86; France and England, 1856; Herstlet's Treaties, vol. 10, p. 108.

(2) 2 Dods. 451.

(3) 7 Cranch, U. S. Supreme Court Rep. 116.

(4) 1 Dods. 320.

(5) White and Tudor's Leading Cases in Equity, 4th ed. vol. 2, p. 923.

(6) 5 M. & S. 503.

(7) 5 Dowl. 522.

by Dana, p. 161; and if he elects to come to this country as a trader or send a vessel to trade here, he cannot claim the privileges and immunities which the comity of nations would otherwise accord to him in his character of a sovereign: Twiss, Law of Nations, vol. 1, s. 205, pp. 313, 314. If this contention is right, and a foreign sovereign can contract himself out of the privileges of his sovereignty, it is abundantly clear that, even assuming that the Khedive of Egypt is an independent sovereign, all privileges of immunity have been waived with reference to this vessel. In fact, the *Charkieh* came here on the footing of an ordinary merchant vessel, and one of the implied terms on which she was received into this country as a trader was, that she should conform to English law and be amenable to the jurisdiction of our courts.

Butt, in reply.

Cur. adv. vult.

May 7. SIR ROBERT PHILLIMORE. This is a cause instituted on behalf of the Netherlands Steamship Company, the owners of the steamship *Batavier*, and on behalf of the master, crew, and passengers thereof, against the screw steamship *Charkieh* and her freight, for damages arising out of a collision between the *Batavier* and the *Charkieh* in the river Thames, on the 19th of October, 1872.

The cause was instituted and the *Charkieh* was arrested by a warrant from this Court on the 21st of October.

No appearance was at that time entered on behalf of the owners of the *Charkieh*, but in the month of November an application was made on behalf of his Highness Ismail Pacha, Khedive of Egypt, to the Court of Queen's Bench for a prohibition to restrain this Court from proceeding further in the suit, and a rule nisi was granted, which rule was, after argument, on the 23rd of January, 1873, discharged. (1)

It appears from the report that the Court of Queen's Bench expressed no opinion upon the question which it was sought to raise on the application for a prohibition, deciding only that the question was one upon which this Court was specially qualified to adjudicate. Since this decision an appearance has been entered

(1) Law Rep. 8 Q. B. 197.

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under protest for his Highness Ismail Pacha, the Khedive of Egypt, the owner of the *Charkieh*, and Admiral Latif Pacha, Minister of Marine of the government of Egypt. The pleadings on protest have been filed; they consist of a petition on behalf of his Highness the Khedive, an answer on behalf of the owners of the *Batavier*, a reply, and a conclusion. The petition concludes with a prayer to this Court—[His lordship here read the prayer of the petition].

The principal averments of fact and law in the petition are the following: That the *Charkieh* is the property of his Highness Ismail Pacha, the Khedive of Egypt, as reigning sovereign of the state of Egypt, and is a public vessel of the government and semi-sovereign state of Egypt.

In support of this proposition certain matters of fact connected with the history of this vessel are set forth in the succeeding articles. It is alleged that "from the time when the *Charkieh* became the property of His Highness the Khedive, as sovereign prince of Egypt," she has been "a ship of the Egyptian branch of the Imperial Ottoman navy," entitled to carry and carrying "the Ottoman naval pendant and the Ottoman naval ensign, which are used by all the ships of the Egyptian navy as distinguished from Egyptian merchant vessels." This designation, "Egyptian navy," appears to me, for reasons hereafter to be stated, inaccurate. It is further alleged that the *Charkieh* is officered by Egyptian officers holding commissions from the Khedive "in the naval service of the Egyptian government;" that the officers and crew are appointed by the minister of marine of the government of Egypt, and the ship was under his control at the time of her arrest. That some time before she left Egypt for England she was "under the control and orders of the Egyptian minister of the interior, and was employed by him as a government packet, carrying the mails, and passengers, and cargo between Alexandria and Constantinople." That in September, 1871, she was sent to England to be repaired, with proper credentials. That for the purpose of lessening expense she brought cargo to England, and, at the time of her arrest, was advertised to carry cargo back to Alexandria. That all freights and passage money earned by her were received and accounted for by the Egyptian Minister of the Interior as part of the public revenues of Egypt. That she had

completed her repairs and was returning from a trial trip when the collision happened; and I may observe here that she had a small portion of the cargo which she was to carry to Alexandria then on board.

The answer, in substance, sets up that the *Charkieh* came to England on the footing of an ordinary merchant vessel, and was so treated without objection in all respects by the proper public authorities of England. That she was regularly advertised as a merchant vesssl when about to leave Alexandria for England, and when again about to return, on the former occasion carrying cargo on the terms of ordinary bills of lading. It appears from the evidence that she was chartered to an English subject for the voyage to Alexandria.

The answer further submits that the Khedive "is not such a reigning sovereign as to entitle him or the government of Egypt to have accorded to the *Charkieh* by the comity of nations or otherwise the privileges or immunities of a public vessel of war of an independent sovereign or state, or the privilege of freedom from arrest and process in this suit."

Not much oral evidence has been given in this cause. The first witness had the rank of a pacha, and held a commission, as rear-admiral, granted by the Porte. He had been sent to England by the Khedive to superintend the repairs of this vessel. I collected from him that there is at present a fleet of six or seven vessels belonging to the Khedive, all engaged in ordinary commerce, "taking" (to use the words of the witness) "cargo, specie, passengers, everything," and all employed in the same service as mail vessels between Alexandria and Constantinople. It appears that the same vessels belonged before to a private merchant company, and were sold to the Khedive.

The *Charkieh* carried the flag of the Imperial Ottoman Navy. It appears that there is a flag used for Egyptian merchant vessels, but no flag of the Egyptian navy, as pleaded. A person of the name of Anderlich is acting commander, with no naval rank, and not a subject of the Khedive. The Khedive appoints to no higher rank than that of colonel in the army, the Sultan appointing all higher officers, and similarly in the navy.

Mr. Jackson deposed that his firm acted as brokers for the

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Charkieh; that he chartered the *Charkieh* back to Alexandria, and caused handbills to be printed, of which the following is a specimen: [His lordship here read the advertisement annexed to the answer.] He said that the *Charkieh* on her arrival here was entered by him at the Custom House like an ordinary merchant vessel; that he stated that, as the ship belonged to the Khedive, he had no register to produce and the excuse was admitted, that he paid light, pilotage, and tonnage dues.

O'Connor, a Custom House officer, was examined. He boarded the *Charkieh* at Gravesend, and went up with her to the docks, where he left her in charge of the Custom House authorities.

From these averments in the pleadings, and these facts in the evidence, the following questions arise:

1. Is the international status of the Khedive that of sovereign prince of Egypt?

2. Is he entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this Court?

3. If he be entitled to this privilege, has he waived or forfeited it?

I proceed to consider these questions in their order, and first, as to the international status of His Highness the Khedive. Very scanty evidence as to this status of the Khedive was produced before me at the hearing of the case. I was told by the counsel for his Highness that it was considered improper to offer evidence upon this subject, that it was my duty to take official cognisance of that status, and to obtain, by reference to the Foreign Office, any information which I might think necessary. Whether this was, or was not, the right course on the part of counsel to adopt, I do not now stop to inquire. I have endeavoured to inform myself, and have had recourse to the following sources of knowledge:

1. The general history of the government of Egypt.

2. The firmans which contain the public law of the Ottoman Empire on this subject.

3. The European treaties, which concern the relations between Egypt and the Porte.

4. The answer which the Foreign Office has furnished to an inquiry which I thought it my duty to make.

In the first place, some reference to the past as well as to the

present political history of Egypt seems necessary in order to ascertain whether, at any time since the Mahommedan conquest, that country has possessed the character of an independent state; because in weighing the effect of doubtful facts and circumstances arising out of the vicissitudes of national life, it might fairly be considered that such a character once possessed might more easily revert, than, having had no previous existence, be for the first time created. 1873 THE CHARKIEH.

The conquest of Egypt was effected by Amer, the General of the Caliphs, in 638 A.D., and from the death of Caliph Omar, in 644 A.D., it continued to be a province of the Arab empire under a governor appointed by the Caliphs. This nominal subordination to the Caliphs appears to have continued while the government de facto was in the hands of various dynasties, who reigned under the title of Soldan or Sultan of Egypt. The last Sultan of the Memlook dynasty of Egypt, which had been established about 1250 A.D., was overthrown in 1517 A.D., by Selim, I., the Ottoman Sultan of Constantinople.

About this time the last of the Caliphs in Egypt died; the caliphate of Egypt came to an end, and the title of caliph was thenceforward assumed by the Sultan of Constantinople. Although Selim I. abolished the dynasty of the Memlooks, he preserved an aristocracy of that race under the authority of the Viceroy, nominated by the Porte and designated Pacha of Egypt.

By this new constitution, 24 Beys were created: and the obligation was imposed of sending tribute to Constantinople, and of furnishing 12,000 men in time of war. This quasi republic, composed of a Memlook aristocracy, was not wholly abolished till after the period of the French invasion at the close of the last century. During this interval, however, successful chieftains continually revolted from the Porte, and the more powerful of the Beys exercised absolute dominion over the country. In 1747 A.D., Ibrahim Kehia seized upon the supreme authority and declared the independency of Egypt. In 1758 A.D., Ali Bey, not the least remarkable of those warriors who rose to the surface in these troubled times, possessed himself of the government of Egypt, and ruled over that country some time, with an appearance of deference to and a recognition in the abstract of the sovereignty of the Porte,

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up to the period of 1774 A.D., when his eventful career was ended. In 1798 A.D., the invasion of Egypt by Buonaparte took place under the pretext of delivering Egypt from the Memlooks. In 1801 A.D., the victories of England once more restored Egypt to the dominion of the Porte.

In 1806 A.D., an important epoch begins. In that year Mohammed Ali obtained from the Sultan a legal nomination to the Pachalic of Egypt, the actual authority of which he was already exercising. After the departure of the English from Alexandria and the massacre of the Memlook Beys, Mohammed took the command of forces previously sent by him into Arabia, to subdue the sect of the Wahabees. During the interval between this period and 1831 A.D., he possessed an army of 60,000 men and a considerable navy, established a de facto empire from Senaar and Kadofan over all Syria to Adana, a part of Cilicia at the foot of Mount Taurus, and ruled over the island of Candia. The Porte, struggling with the rebellion of the Pacha of Janina, not subdued till 1822 A.D., and the uprising of the Greeks, whose liberties were established by the battle of Navarino in 1827 A.D., opposed a fitful, underhand, and feeble opposition to the continued practical aggression, however disguised in language, of its great subject.

Between the battle of Navarino (1827 A.D.) and the treaty, presently to be mentioned, of 1833 A.D., an important portion of Egyptian history intervenes, having a more immediate and direct bearing upon the question of public and international law which I am called upon to decide. Mohammed Ali, on being refused the Pachalic of Acre by the Porte, found various pretexts for the invasion of Syria, on the actual possession of which, it was manifest, the supremacy of the Porte or of the Khedive of Egypt would depend.

In 1831 A.D., the Egyptian army and Ibrahim Pacha passed the frontier. As soon as the Porte was apprised of this event, an order was immediately despatched to Mohammed Ali to recall his troops. To these and further orders he turned a deaf ear. An official declaration of war against him, preceded by a religious anathema or public declaration that he and his sons were rebels, and out of the pale of Mussulman law, did not stop his course.

In May, 1832, Acre was captured by his troops. Not long after-

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wards all Syria was conquered for him by Ibrahim, his general and son. The armies of the Porte were routed and destroyed, and the advance of the conqueror upon Constantinople was only prevented by the intervention of the great European Powers. Nevertheless, by a kind of convention usually called the treaty of Kutaieh (1), between the Sultan and Mohammed, the latter obtained a great addition of power and territory; for he retained possession of Syria and the passes of Mount Taurus or the district of Adana. He undertook indeed to pay tribute for Syria, as well as Egypt; but, with his army and navy untouched, and with these possessions, the Pacha of Egypt was allowed to remain, in fact, more powerful than his nominal master at Constantinople.

Here I will pause a moment to consider the law applicable to the facts as now stated.

What were the relations at this epoch existing between the Khedive and the Porte, and what was the nature and character of the authority of the former, so far as foreign states are connected with these considerations? Did they entitle the Khedive to the privilege of the sovereign of an independent state? These are questions which must be answered, like all others appertaining to international jurisprudence, by a reference to usage, authority, and the reason of the thing.

Many accredited writers and jurists have drawn a distinction, which seems not to have escaped the framer of the Khedive's petition on protest now before me—between a sovereignty absolute and pure, and that less complete and perfect dominion to which the name of half-sovereignty (demi-souverain) has been given. I am inclined to think that the sovereign of a state in the latter category may be entitled to require from foreign states the consideration and privileges which are unquestionably incident to the sovereign of a state who is in the former category. There are also certain acts of feudal homage, or, as jurists say, servitutes juris gentium, which do not disentitle the state obliged to them to an international existence as a separate state.

Some examples of half sovereignties are to be found in history. Some of the smaller states (halb souverain) of the German confederation, before it was virtually destroyed by Napoleon's

(1) See Testa, Recueil des Traités de la Porte Ottomane, t. ii. 354.

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confederation of the Rhine, and formally extinguished by the abdication of the Emperor Francis in 1806, also furnished examples of states cum imminutione imperii—to borrow the expression of Grotius (1)—but entitled to be treated as states by foreign powers. The old feudal relations of the Dukes of Burgundy, Normandy, and Brittany to France did not, I believe, prevent these princes from being considered as sovereigns at home and abroad, and from being entitled to be represented by ambassadors at foreign courts.

Other instances might be mentioned, in which neither the payment of tribute, as in the cases of the Kingdom of the Two Sicilies to the Pope, continued till 1818 A.D., or of the King of Hungary to the Sultan, from the reign of Ferdinand the First till the treaty of Silvatorok in 1606 A.D., nor other acts of purely feudal homage,—such as the presentation of the white palfrey presented to the Pope by the King of the Two Sicilies,—(2) disentitled the representative of a state in these conditions to the enjoyment abroad of the privileges usually accorded to a foreign sovereign or his representatives.

It has been well said by a commentator on Martens' work :—

"La souveraineté extérieure n'est autre chose que l'indépendance de l'État vis-à-vis des autres états." (3)

It may, moreover, be that, if such a status existed de facto, it would not be the province of the tribunals of a foreign state to look beyond the fact, or to inquire minutely or at all into the history of its establishment. International law has no concern with the form, character, or power of a state, if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states. An apt illustration of this position is furnished by the status accorded by European Powers in more modern times to what were once commonly called the Barbary States. They had practically shaken off the Ottoman dominion. Bynkershoek describes them as "civitates quæ certam sedem atque ibi imperium

(1) Grotius, De Jure Belli et Pacis, lib. ii. c. xv. s. vii. 1; Cambridge edition, 1853, vol. 2, p. 136..

(2) See Phill. Int. Law, 2nd ed. vol. 2, 434.

(3) Pinheiro Ferreira on Martens, Précis du droit des gens, edited by Vergé, l. i. c. 3, s. 23, t. i. p. 98, Paris, 1858.

habent, et quibuscum nunc pax est nunc bellum, non secus ac cum aliis gentibus, quique propterea ceterorum principum jure esse videntur." (1) And in the year 1801 Lord Stowell fully adopted this position, and asserted that the African states had "long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states;" and he remarked that, "although their notions of international justice differ from those which we entertain, we do not on that account venture to call in question their public acts,"—that is to say, that, although they are perhaps on some points entitled to a relaxed application of the principles of international law, derived exclusively from European custom, they are nevertheless treated as having the rights and duties of states by the civilized world: *The Helena.* (2)

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It is to be observed, however, that the Court proceeded upon the principle that a nation with whom we had regular treaties was de facto acknowledged without a formal recognition to have what jurists have termed the right of a political personality (Klüber, § 25 (3)), that is, the position of a state in the great commonwealth of nations.

If, at this period, I had been obliged to decide whether the Pacha of Egypt was entitled to the privilege of a sovereign in this country, my decision would have been influenced by a regard to the de facto sovereign rights apparently exercised at this period by his Highness; and perhaps the analogy of an European state having absolute dominion over its own subjects with feudal subordination to another state might have been cited with effect.

Though, even in this crisis of the history of Egypt, when the independence of that country was so nearly established, it must be observed that no attempt appears to have been made on behalf of the Pacha to exercise the principal international attribute of sovereignty, namely, the jus legationis, to be represented by an ambassador or diplomatic agent at the court of foreign sovereigns;

(1) Bynkershoek, Quæstiones Juris Publici, lib. i. c. 17; Opera Omnia, vol. 2, p. 223, ed. 1767.

(2) 4 C. Rob. 3.

(3) Klüber, Droit des gens moderne de l'Europe, par M. A. Ott, Paris, 1861, p. 35.

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nor is there any reason to believe that such an attempt, if made, would have been successful.

But in the interval between 1833 A.D. and 1841 A.D. the scene is greatly changed. The actors remain, but play very different parts.

Nor is it unimportant to observe, with reference to the question immediately before me, that the stream of Egyptian political history, however immiscible the characters of the individual Mahommedan and Christian may be, has ever since this epoch been greatly affected by the currents of European diplomacy. I pass by earlier treaties and the treaty of Unkiar Skelessi in 1833 A.D. (1), which, placing Turkey under the protectorate of Russia, has been superseded by a later treaty. Mohammed Ali and Ibrahim, in 1834 A.D., pursued the scheme of uniting all the provinces belonging to the caliphate under their Government; but discontents arose among the natives of Syria, which were not appeased by the disarmament of the Druses and of the population generally. These discontents revived the hopes of the Sultan, and, in 1839 A.D., he sent another army into Syria, which was defeated at Nezib. But in 1840 A.D., Mohammed Ali was made aware that the European powers would not allow an Arab empire to be established on the ruins of the Ottoman state.

England sent an agent to warn the Pacha of his danger, and, in answer to a statement of his rights, the following language was used: "I have to instruct you," said Lord Palmerston to Colonel Hodges, the agent employed, "on the next occasion on which Mohammed Ali shall speak to you of his rights, to say to his highness, that you are instructed by your Government to remind him that he has no rights except such as the Sultan has conferred upon him; that the only legitimate authority which he possesses is the authority which has been delegated to him by the Sultan over a portion of the Sultan's dominions, and which has been entrusted to him for the sole purpose of being used in the interest and in obedience to the orders of the Sultan; that the Sultan is entitled to take away that which he has given; that the Sultan may probably do so if his own safety should require it; and that

(1) Martens, Nouveau Recueil de Traités, tom. xi. p. 655; State Papers, vol. 20, p. 1176.

if in such case the Sultan should not have the means of self-defence, the Sultan has allies, who may possibly lend him those means" (Correspondence relating to the affairs of the Levant presented to Parliament in 1841. pt. 1. p. 592).

And on the 18th of July, 1840, Lord Palmerston wrote to Colonel Hodges as follows: "You will see that orders have been given to the British fleet to act at once, by cutting off the communication between Syria and Egypt, and by helping the Syrians. If Mehemet Ali should complain of this, and of its being done without notice, you will remind him civilly that we are the allies of the Sultan, and have a right to help the faithful subjects of the Sultan in maintaining their allegiance, and to assist the Sultan against those of his subjects who are in revolt against him, as Mehemet Ali is; and that Mehemet Ali, not being an independent sovereign with whom the Four Powers have any political relations, those Powers are not bound to give him any notice of their intended proceedings" (Ibid., pt. 2, p. 5).

And again, on the 14th of September, 1840, Lord Palmerston wrote, "With reference to your despatch of the 17th of August, I have to instruct you to state in writing to Mehemet Ali, if the state of things should render it necessary to do so, that Egypt is a portion of the dominions of the Sultan; that British subjects have certain rights and privileges as to the security of their persons, property, and commerce in all parts of the Ottoman Empire, by virtue of treaties concluded between the British Crown and the Porte; and that any subject of the Sultan, whether in a state of obedience to, or of revolt against, the authority of the Sultan, who should take upon himself in any way or in the slightest degree to molest British subjects, or to interfere with the exercise of their rights and privileges, would incur a heavy and most serious responsibility" (Ibid. pt. 2, p. 187).

These passages from the despatches of the English Secretary for Foreign Affairs were not adverted to in the argument of counsel. I suppose, however, that, after such reference, it could not be contended that, if at this epoch the question now before me as to the claim of the Khedive to be treated by England as a sovereign prince had arisen, such a claim could have been maintained in this Court.

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Have events subsequent to this epoch made this claim, then untenable, capable of being sustained? Surely not; for the principles of international policy enunciated in these despatches were fully carried into execution by the convention of the 15th of July, 1840 (1), by which Austria, England, Prussia, and Russia concurred in the determination to protect the Porte by coercive measures, if necessary, against the Pacha. Whether the Pacha should be a sovereign prince or a subject, however powerful, of the Porte, seems to have depended on the result of this war. But the consequence of this European intervention was the rapid overthrow of the Pacha's power in Syria; after which the Sultan issued to the Pacha the firman of the 13th of February, 1841, to which I will presently refer, and which will be found with the other firmans bearing on this subject in the appendix to this judgment.

In 1849 Mohammed Ali, having ceased to rule on account of imbecility in the preceding year, died, and was succeeded by Abbas, who died in 1854 A.D.; to him succeeded Saed, who died in 1863 A.D., and to him succeeded the present Khedive. In 1866, 1867, 1869, A.D., circumstances induced the Porte to issue additional firmans. In these documents, as well as in the firman of 1841, are to be found the existing relations between the Porte and the Pacha of Egypt, now called the Khedive. The principal and most important of these relations may be said to form part of the present public law of Europe.

The first firman of the 13th of February, 1841 (of which I have only the French translation) begins by reciting the act of submission (l'acte de soumission) by the Pacha, and the experience which he has acquired during the time he has occupied the position of "Gouverneur de l'Égypte," and proceeds:—"Je t'accorde le gouvernement de l'Égypte dans ses anciennes limites, avec le privilége additionnel de l'hérédité." Certain conditions are added as to the succession of his heir in the direct male line, on the failure of which the Porte is to confer the government on some other person" (Correspondence relating to the affairs of the Levant, pt. 3, p. 436). And then follows this important qualification (at p. 437): "Bien que les Pachas d'Égypte ayent obtenu le privilége

(1) Hertslet's Treaties, vol. 5, pp. 535, 544; Murhard, Nouveau Recueil de Traités, tom. i. p. 156.

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de l'hérédité, ils doivent cependant être considérés quant à la préséance comme étant sur un pied d'égalité avec les autres Vizirs, ils seront traités comme les autres Vizirs de ma Sublime Porte, et recevront les mêmes titres que l'on donne aux autres Vizirs quand on leur écrit."

All the treaties concluded, or to be concluded, between the Porte and friendly powers "seront complétement mis à l'exécution dans la province de l'Égypte aussi;" so also the fundamental laws contained in the Hatti-Sheriff of Gulhané (3rd of November, 1839, State Papers, vol. 31, p. 1239). All taxes are to be imposed and received in the name of the Sultan, and "attendu que les Égyptiens aussi sont les sujets de ma Sublime Porte," certain regulations are to be made to prevent their being harassed by the manner of their imposition. The amount of annual tribute is to be fixed. The army is not to exceed 18,000 men, "Mais vu que les troupes de terre et de mer de l'Égypte sont instituées pour le service de ma Sublime Porte, il sera permis, en temps de guerre, de les porter au nombre qui aura été jugé convenable par ma Sublime Porte."

The troops are to carry the same colours as those of the Porte.

In the firman of the 27th of May, 1866 (1), which settled the mode of succession to the Pachalic, the Sultan speaks of the acts of the viceroy "depuis ta nomination au gouvernement général de l'Égypte, qui est l'une des provinces les plus importantes de mon Empire."

In the firman of the 15th of June, in the same year (1), the Sultan settled the mode of appointing a regency in the case of the viceroy dying before his son had attained the age of eighteen years.

The firman of the 8th of June, 1867 (1), is addressed "to my illustrious Vizier Ismail Pacha, who now holds the rank of Grand Vizier, with the title of 'Khidev' of Egypt." It again refers to the fundamental laws which are to be observed in Egypt as well as in other parts of the dominions of the Porte, but allows the viceroy to frame certain regulations, and then proceeds (here I have only the English translation):—

"In like manner, whilst all the treaties of the Sublime Porte

(1) See Appendix to this case.

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must be respected in Egypt, an exception is made only as regards the custom duties, and as regards foreigners, in matters relating to the police, postal and transit services, for which full powers are given to thee to enter into special arrangements with foreign agents. But such arrangements must not take the form of treaties or conventions having any political signification or purport. And in the event of their being inconsistent with the principles laid down above, or opposed to my original sovereign rights, it will be necessary to note them as null and void."

On the 29th of April, 1861, a treaty of commerce and navigation between Her Majesty and the Sultan was signed at Kanlidja. By the 20th Article it is provided that "The present treaty shall receive its execution in all and every one of the provinces of the Ottoman Empire; that is to say, in all the possessions of His Imperial Majesty the Sultan situated in Europe or in Asia, in Egypt, and in the other parts of Africa belonging to the Sublime Porte, in Servia, and in the United Principalities of Moldavia and Wallachia." (1)

I have been informed that the British Consul General in Egypt does not obtain an exequatur from the Viceroy, but on his appointment obtains the berat or exequatur from the Porte.

The result, then, of the historical inquiry as to the status of his Highness the Khedive, is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire. That the Egyptian army is regulated as part of the military force of the Ottoman Empire. That the taxes are imposed and levied in the name of the Porte. That the treaties of the Porte are binding upon Egypt, and that she has no separate jus legationis. That the flag for both the army and the navy is the flag of the Porte.

All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of states.

Against this array of negative proof is to be set the solitary circumstance that the office of Khedive is hereditary. It requires

(1) Hertslet's Treaties, vol. 11, pp. 561, 567.

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but little consideration to see that this peculiarity cannot affect the question. Egypt remains a province of an empire, and does not become an empire, because her viceroy is hereditary. The viceroy does not become a sovereign prince because his sovereign permits him to transmit the viceroyalty to his descendants in the direct male line. The hereditary character does not confer on the holder, in this case, the right of making war and peace, of sending an ambassador, or of maintaining a separate military or naval force, or of governing at all, except in the name and under the authority of his sovereign.

The hereditary character of the Viceroyalty may make the Viceroy the chief subject of the Porte, but he is still a subject prince, and not a sovereign prince or "reigning sovereign" even "of a semi-sovereign state," according to the terms of the petition on protest.

I have one more observation to make before I leave this branch of the subject. It cannot be urged in favour of the exemption of the *Charkieh*, that, though she may have been erroneously claimed as a public vessel of the Egyptian government, it is substantially the same thing if she be a public vessel of the Ottoman government of which the government of Egypt is a part; because at the very beginning of these proceedings I directed the Registrar to write the following letter to the ambassador of the Porte:—

[His Lordship read the letter set out above.]

No answer has been sent to this letter, and no intervention of any sort has taken place on behalf of the Porte. Thereupon this argument occurs,—It cannot be denied that for the abuse of the privilege of the sovereign or the ambassador, some remedy must be found. It has been shewn that the Khedive has six or seven ships acting as merchantmen, for whom he claims the same privilege as for the *Charkieh*, and the number may be indefinitely increased. It has been said that the remedy is to be found in an application to the sovereign to abate the abuse.

Any such application must be made in the present instance to the Porte. But the ambassador of the Porte asserts no such claim. It is the governor of a province of the state that insists upon the privilege. To communicate directly with the governor in this matter would be to derogate from the dignity of his sove-

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reign, and to place in the rank of a sovereign a governor whom his own sovereign has placed in the rank of a subject.

Lastly, no treaty ever having been made with his Highness, no ambassador ever received from or sent to him, British consuls in Egypt receiving no exequatur from him, there being, in other words, no de facto recognition of his Highness as a sovereign by our government, has there been any recognition de jure of him in this capacity?

The Court of Chancery, when a plaintiff averred in his bill that a certain republic in Central America had been recognised as an independent government, put itself in communication with the Foreign Office, and after such communication, declared itself authorized to state that the republic in question had never been recognized by the government of this country, and on the ground that what was pleaded was "historically false," allowed a demurrer to the bill: *Taylor* v. *Barclay.* (1) I have communicated with the Foreign Office, and have received the following answer to my questions, viz.: "that the Khedive has not been and is not now recognised by Her Majesty as reigning sovereign of the state of Egypt." "He is recognised by Her Majesty's government as the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Turkey."

Upon all these facts I have arrived at the conclusion that, independently of any other consideration, his Highness the Khedive has failed to establish his claim to exempt his vessel from the process of this Court.

I am not deterred from arriving at the conclusion by the alleged precedents which have been cited to me. The first is a French decision, which was cited to me from Phillimore's International Law, vol. ii. p. 138. It was delivered by the Tribunal Civil de la Seine, which tribunal carries with it a respectable though not an overwhelming authority. That tribunal declined to entertain an action against Mehemet Ali, as Viceroy of Egypt, for 100,000 francs, alleged to be due to M. Solon for his services respecting a school at Cairo. The defence was conducted principally upon the ground that a foreign government (gouvernement étranger) could not be sued in an action of that description, which appears to

(1) 2 Sim. 213.

have been founded on an attachment of goods belonging to the Egyptian government. I observe that the principal ground on which the judgment is rested is as follows: "Attendu que toutes les expressions de la demande lui donnent le caractère personnel et révèlent qu'elle est dirigée contre le gouvernement Égyptien, et non contre un particulier." The judgment does not seem to me to go beyond the principles that an action will not lie against a foreign government in a matter of state policy; and it may well be that the Egyptian government in this matter were exercising functions coming within the scope of the authority which the Porte had delegated to the Viceroy.

Some other judgments (three apparently) were cited from cases decided, but not reported, before the Common Pleas in 1866 and 1867. (1) An application was made to the Court on behalf of the Pacha of Egypt to prohibit proceedings in the Mayor's Court. This case appears to me clearly to have turned upon a question relating to the authority of the Mayor's Court. A rule nisi having been obtained, and no cause subsequently having been shewn, the rule was made absolute as a matter of course.

In the other cases prohibition was applied for upon two grounds —want of jurisdiction in the Mayor's Court, and the Pacha's being a sovereign prince; and in these cases, as in the other, no opposition having been made, the rule was granted as a matter of course, without any argument or appearance on the other side.

I cannot find anything in these alleged precedents which ought to obstruct the conclusion at which I have arrived, and which I have stated.

But I am unwilling to leave the elaborate argument which has been addressed to me on the other parts of the case without the expression of my opinion; and I will proceed to consider, in the second place, whether, assuming the Khedive to be entitled to claim exemption as a sovereign prince, he is entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this Court.

In order thoroughly to examine this question as to the immunity of sovereign princes and their representatives from the jurisdic-

(1) *Melanidis* v. *Ismail Pacha*; C. P. June 6, 12, 1866; July 12, 1866; Jan. 16, 1867.

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diction of the tribunals of the state in which they happen to be, and to avoid the consequences of a false theory on this subject, it is expedient to state with precision the foundation upon which this privilege rests. Upon principles of general jurisprudence the presence of a person or of property within the limits of a state founds the jurisdiction of the tribunals of that state. "Subjectio autem, ut modo indicabam," as Bynkershoek says, "duplex est, altera personæ, altera rei, in imperio, quo de agitur, sitæ, et ex utraque forum sortimur." (De Foro Legatorum, c. ii. Opera Minora, ed. 1752, p. 435.) (1) The sovereign prince or his representative is exempted from the operation of this principle, absolutely, so far as his person is concerned, and with respect to his property, at least so far as that property is connected with the dignity of his position and the exercise of his public functions.

Upon what grounds is this exemption allowed? Not upon the possession on behalf of the sovereign of any absolute right in virtue of his sovereignty to this exemption; such a right on his part would be incompatible with the right of the territorial sovereign; and not, as is sometimes carelessly said, upon the ground that he and his property are to be considered as still remaining in his own territory. This is indeed the fiction of law expressed in the term "exterritoriality," by which the nature of the immunity is illustrated; but it is illogical and inaccurate to consider it as the ground of that immunity. The true foundation is the consent and usage of independent states, which have universally granted this exemption from local jurisdiction in order that the functions of the representative of the sovereignty of a foreign state may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise. Bynkershoek says:—"Quod legati fori præscriptione utantur, una ratio est, ne impediatur legatio, hoc est, ne legati persona Principi suo fiat inutilis; at inutilis non erit, bonis detentis, inutilis non erit, quamvis in foro nostro litiget, quamvis vincatur, quamvis ea ipsa bona, pignori capta, in causam judicati, distrahantur, et inde satisfiat creditoribus. Non ex personæ, sed ex bonorum subjectione id judicium subsistit, idque perinde agetur, atque si legatus

(1) Bynkershoek, Opera omnia, vol. 2, p. 148, ed. 1767.

apud nos legatus non esset" (De Foro Legatorum, cap. xvi. Opera Minora, ed. 1752, p. 512). (1)

The same doctrine is laid down in the case of *The Schooner Exchange* v. *M'Faddon* (2) decided, in 1812, by the Supreme Court of the United States, and the case of *The Santissima Trinidad* (3), decided by the same tribunal in 1822.

As far as my researches have extended, I cannot find any country in which this immunity has been carried to a greater length or more favourably considered than in England, from the time at least of the passing of the statute 7 Anne, cap. 12, in the year 1708, to the decision of the Queen's Bench, in 1859, in the case of *The Magdalena Steam Navigation Co.* v. *Martin.* (4) The cases principally relied on before me have been *Barbuit's Case* (5), decided by Lord Chancellor Talbot in 1737, as to which it is enough to state the observation of Mr. Justice, afterwards Lord Chief Justice Erle, in *The Magdalena Steam Navigation Co.* v. *Martin* (4): "All that is said about an ambassador, in the judgment in that case, is extrajudicial. The decision was that the applicant, being only a consul, was not entitled to the privilege, whatever that might be, of an ambassador."

The cases of *Triquet* v. *Bath* (6), decided by Lord Mansfield in 1764, and *Heathfield* v. *Chilton* (7), decided by the same authority in 1767, are, both of them, remarkable for Lord Mansfield's observations upon the statute of Anne. In the first case he observes: "This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament of 7 Anne, c. 12, is declaratory of it. All that is new in this Act is the clause which gives a summary jurisdiction for the punishment of the infractors of this law." And in the second case he says: "The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England; and the Act of Parliament of 7 Anne, c. 12, did not intend to alter, nor can alter, the law of nations."

(1) Bynkershoek, Opera omnia, vol. 2, p. 169, ed. 1767.

(2) 7 Cranch, U.S. Supreme Court Rep. 116.

(3) 7 Wheaton, 283.

(4) 2 E. & E. 94; 28 L. J. (Q.B.) 310.

(5) Cases tempore Talbot, 281.

(6) 3 Burr. 1478.

(7) 4 Burr. 2015.

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But, in truth, the whole law upon this subject, so far as English decisions are concerned in it, will be found completely exhausted in the arguments and decisions in the cases of *Taylor* v. *Best* (1), decided by the Court of Common Pleas in 1854, and *The Magdalena Steam Navigation Co.* v. *Martin* (2), decided by the Court of Queen's Bench in 1859. In the former case the Court held that a secretary of legation might voluntarily abandon his privilege, and that in a case where he was sued jointly with others and appeared to the process, and allowed the suit to go on to an advanced stage without offering any objection, and where there did not appear to be any intention on the part of the plaintiff to interfere with either the person or the property of the ambassador, and where the action might proceed to its ultimate termination without any such molestation or interference, it could not give effect to a claim of privilege. In the second case the defendant pleaded his privilege as envoy, and, among other things, that he had not waived or disentitled himself to the exemptions appertaining to a public minister. He had been a shareholder in a certain company, at the winding-up of which he was called upon to contribute in respect of his shares. Lord Campbell delivered an elaborate judgment, which concluded in these words: "It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant." The judgment was mainly founded upon the principle laid down by Grotius (De Jure Belli et Pacis, lib. ii. c. xviii. s. ix. 1 (3), "Omnis coactio abesse a legato debet;" and it was holden that the service of process upon him and the necessities of a defence could not take place, to use Lord Campbell's words, "without coactio."

Bynkershoek agrees with the opinion of Grotius expressed in the general terms just cited, but appears to differ from Lord Campbell as to what would amount to "coactio," and, to say the least of it, to doubt very much whether the "in jus vocatio" could be so considered.

(1) 14 C. B. 487; 23 L. J. (C. P.) 89.
(2) 2 E. & E. 94; 28 L. J. (Q. B.) 310.
(3) Grotius, De Jure Belli et Pacis, Cambridge edition, 1853, vol. 2, p. 216.

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The result of these decisions appears to me to be that the ambassador is personally exempt from the service of all process in a civil cause and from any action which renders such service necessary.

I should observe here that the argument in behalf of the defendant has been conducted upon the principle that the law as to the privileges of the ambassador applies with equal force to the sovereign, and I agree with that proposition. ". . . Major non est sanctitas," says Bynkershoek, "mandatarii quam mandantis, si res suas ipse velit agere" (De Foro Legatorum, c. iii., Opera Minora, p. 445, ed. 1752.(1) But how is the argument to be applied to this case, in which the person claiming the rights of a sovereign can neither send nor receive an ambassador?

The conclusion, however, to which I have come, as to the privileges of an ambassador, by no means disposes of the question now before me.

It remains to be considered whether there may not be a proceeding in rem (a mode of proceeding which Courts of Admiralty have adopted from the civil law) against property of the sovereign or ambassador which is free from the objections fatal to the other modes of procedure which I have mentioned. It is worthy of observation that the counsel for the ambassadors in the cases both of *Taylor* v. *Best* (2) and *The Magdalena Steam Navigation Co.* v. *Martin* (3) were careful to guard themselves from saying that such a suit might not be instituted. "All the authorities," says Mr. Willes—counsel for the plaintiff in the case of *Taylor* v. *Best* (2)—who certainly would have omitted no point in favour of his client, "cited on the other side may be explained by observing the distinction between our laws and the laws of those countries where the civil law obtains. There is nothing in this country analogous to the proceedings of those courts ad fundandam jurisdictionem, except the proceeding by what is called foreign attachment in the Lord Mayor's Court of London. Where the civil law prevails, the proceeding may be had against the person of the defendant if within the jurisdiction, or, if not, against his goods or his lands, if any, and the suit may go on without in

(1) Bynkershoek Opera omnia, vol. 2, p. 151, ed. 1767.

(2) 14 C. B. 487; 23 L. J. (C.P.) 89.

(3) 2 E. & E. 94; 28 L. J. (Q.B.) 310.

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any way touching the person: the proceeding is in rem" (at page 510–511). And Sir Fitzroy Kelly, counsel for the ambassador in the case of *The Magdalena Steam Company* v. *Martin* (1), seems to have admitted that proceedings taken in rem would stand upon a different principle.

So Bynkershoek, "Scilicet in regionibus, ubi ob bona convenimur, et ex eorum arresto forum sortimur, nullus dubito, quin et legatorum bona arresto detineri, et per hoc ipsi in jus vocari possint. Bona, dico, sive immobilia, sive mobilia, dummodo neque ad personam ejus pertineant, neque tanquam legatus, possideat, uno verbo, sine quibus legationem recte obire potest. Hoc tamen, ob personæ sanctitatem, temperamento, ne quid plus capiatur quam legatus debet, et ne quid, quod ille non civiliter possidet, et si quod captum est, quæratur, ad legati personam munusve pertineat, necne, semper pro legato benignior fiat interpretatio" (De Foro Legatorum, cap. xvi. Opera Minora, ed. 1752, p. 510. (2)

In the judgment in *Taylor* v. *Best* (3), Jervis, C.J., uses this language: "It is said—and perhaps truly said—that an ambassador or foreign minister is privileged from suit in the courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person, or the seizure of his personal effects necessary to his comfort and dignity, and that he cannot be compelled in invitum, or against his will, to engage in any litigation in the courts of the country to which he is sent. But all the foreign jurists hold that, if the suit can be founded without attacking the personal liberty of the ambassador or interfering with his dignity or personal comfort, it may proceed. Various passages have been cited to shew that, in countries where the civil law prevails and where jurisdiction can be founded by a proceeding in rem in the first instance, where there are houses or lands which are immoveable, that may be taken to found the jurisdiction, the suit may proceed. Moveable goods, too, which are unconnected with the personal comfort and dignity of the ambassador may be taken for the same purpose."

(1) 2 E. & E. 94; 28 L. J. (Q.B.) 310. 5 Jur N S 1260

(2) Bynkershoek Opera omnia, vol. 2, p. 168, ed. 1767.

(3) 14 C. B. 487, 521; 23 L. J. (C.P.) 89. 18 Jur 405

And in *The Magdalena Steam Navigation Co.* v. *Martin* (1) Lord Campbell, after quoting the authority of Bynkershoek, says:

"In countries where there may be a citation by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited, but all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues, be taken in execution on the judgment."

I think, therefore, that I am not prevented from holding, what it appears to me the justice of the case would otherwise require, that proceedings of this kind, in rem, may in some cases at least be instituted without any violation of international law, though the owner of the res be in the category of persons privileged from personal suit.

In the passage from Bynkershoek which I have already cited, it will appear what kinds of property cannot in the case of a sovereign or ambassador be subject to a proceeding in rem; and the principles to be collected from various other passages in his great work, De Foro Legatorum, combine to establish this proposition of international law, namely, that a proceeding in rem cannot be instituted against the property of a sovereign or ambassador if the res can in any fair sense be said to be connected with the jus coronæ of the sovereign or the discharge of the functions of the ambassador.

Upon these principles ships of war cannot be seized by a creditor of the sovereign to whom they belong; and we learn from Bynkershoek that three vessels (2) belonging to the King of Spain, having been seized by his creditors in the port of Flushing in 1668 A.D., were ordered to be released by the States-General, it being suggested that the remedy of the creditors was to obtain an order for reprisals from the state (De Foro Legatorum, cap. iv, Opera Minora, ed. 1752, p. 448). (3)

It is, however, by no means clear that a ship of war to which salvage services have been rendered may not jure gentium be liable to be proceeded against in a Court of Admiralty for the remuneration due to such services. It is very remarkable that Lord

(1) 2 E. & B. 94, 114; 28 L. J. (Q.B.) 310. (2) "Ejus regni naves bellicas."
(3) Bynkershoek, Opera Omnia, vol. 2, p. 152, ed. 1767.

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Stowell declined to pronounce any opinion upon this point in the case of *The Prins Frederik* (1), though it appears that he had upon principles of English law previously declined to entertain a suit of this kind attempted to be instituted by a British subject against a British man-of-war: *The Comus.* (2)

On the same principle in America the Supreme Court of Massachusetts has holden that a lien allowed by the law against a private person cannot be enforced against a vessel the title of which has vested in the United States: *Briggs* v. *The Light Boats.* (3) Upon the same principle, in *Wadsworth* v. *The Queen of Spain* (4) and *De Haber* v. *The Queen of Portugal* (5), proceedings according to the custom of foreign attachment in the City of London instituted against property belonging to these sovereigns in their public capacity by the holders of Spanish and Portuguese bonds were stayed by prohibition.

In the *United States* v. *Wilder* (6) a question arose whether property belonging to the government was liable to make contribution in a case of general average. Mr. Justice Story said: "It is said that in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy in rem. Now, I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy in rem should be held to exist." And again, "I cannot therefore but think that the circumstance that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the maritime law, does in fact furnish a strong reason for enforcing it. The learned judge then referred to the cases of *The Comus* (2) and *The Prins Frederik* (1), and observed, "A distinction was taken in that case which indeed has been often taken by writers on public law as to the exemption of

(1) 2 Dods. 451.
(2) Referred to in 2 Dods. 464.
(3) 11 Allen (Massachusetts Rep.) 157.
(4) 17 Q. B. 171; 20 L. J. (Q.B.) 488.
(5) 17 Q. B. 196; 20 L. J. (Q.B.) 495.
(6) 3 Sumner U. S. 308, 312, 313, 315.

certain things from all private claims; as, for example, things devoted to sacred, religious, and public purposes; things extra commercium et quorum non est commercium. That distinction might well apply to property like public ships of war, held by the sovereign jure coronæ, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce." And again he says: "In the case of *The Schooner Exchange* v. *McFaddon* (1) it was considered, by the court, that the ground of exemption of the ships of war of a foreign sovereign, coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to a similar exemption."

A strong illustration of the distinction between the jurisdiction in rem and in personam is supplied by the decision of Mr. Justice Story in the case of *Clarke* v. *New Jersey Steam Navigation Company* (2): "The real point of controversy," he says, "is whether the respondents being a corporation created by and having its corporate existence and organisation in the state of New Jersey, is, as a foreign corporation, liable to a suit in personam in the Admiralty in this district (3), not directly, but indirectly through its attachable property here, so as to compel the appearance of the corporation to answer the suit, or at all events to subject the property attached to the final judgment and decree of the court. The whole argument turns upon this proposition, that there is a distinction between the case of a private person and that of a corporation. The former is suable in the Admiralty by process of attachment, in a suit in personam, against his property found in the district, although he may not personally be found within the district; whereas a corporation is liable to be sued only in the state where it has its corporate existence, and from which it derives its charter, and not elsewhere, although its property may be found in the district where the suit is brought." Then follow these significant words: "If the present were a suit in rem against the property to enforce a right

(1) 7 Cranch U. S. Supreme Court Rep. 116. (2) 1 Story, 531, 537.
(3) The district of Rhode Island.

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of property or a lien, or to subject it, as the offending thing"—the expression is remarkable—"(as in cases of collision), to the direct action of the court, the case could not admit of any real doubt; for in all proceedings in rem, the Court having jurisdiction over the property itself, it is wholly unimportant whether the property belongs to a private person or to a corporation, to a citizen or to a foreigner, to a resident or to a non-resident, to a domestic or to a foreign corporation. In each and in every such case the jurisdiction is complete and conclusive."

I am disposed to hold that, within the ebb and flow of the sea, in the case of salvage the obligatio ex quasi contractu attaches jure gentium upon the ship to which the service has been rendered, and in the case of collision the obligatio ex quasi delicto attaches jure gentium upon the ship which is the wrong-doer, whatever be her character, public or private, and such, I think, was the inclination of Lord Stowell's mind in the case of *The Prins Frederik* (1), and in the case of *The Swift* (2), to which I will presently advert. But it is not necessary in the present case to travel to this goal, because a nearer one is at hand. This ship cannot claim exemption as a ship of war. She carries, indeed, the flag of the Porte; but she is not equipped in any sense for war, nor does she pretend to be so.

Apart from the question of the liability jure gentium, to which I have adverted, I am not prepared to deny that the private vessel (for instance, the yacht of the *Sultan*), though equipped for pleasure and not for war, would be entitled by international comity, operating (at least so long as it is not withdrawn by the state conceding it) as international law, to the same immunity as a ship of war; though dicta to the contrary may be found in the writings of some jurists.

But it seems to me idle to contend, in the face of the evidence before me, that these six or seven ships are not trading vessels to all intents and purposes, though when engaged in their regular employment they carry mail bags. But, again, I am not obliged to predicate this character of all these vessels; the one before me is actually chartered to a British subject, and has been by him publicly advertised like any other merchant vessel to carry

(1) 2 Dods. 451. (2) 1 Dods. 320, 339.

cargo, for which he is to receive the freight. That this cargo is liable to a lien for salvage has not been denied; but suppose, under the 6th section of the Admiralty Court Act, 1861, 24 Vict. c. 10, the owners of the cargo were to bring a suit in rem against the ship for damage to the cargo, must that suit be dismissed, and justice so far denied, because the ship was only chartered, and was not, according to the technical term of English law, demised to the British subject, and therefore remains the property of the Khedive? Such has been necessarily the contention of the counsel for the Khedive. I cannot assent to it; the mere statement appears to me to carry with it a refutation of the argument.

It was ingeniously argued by Mr. Cohen that it mattered not whether the suit was in rem or in personam, because the object of the jus in rem was to enforce the jus in personam; and the cases of *The Druid* (1), and *The Thetis* (2), were cited in support of this proposition. But this argument in its relation to the present case appears to me fallacious. The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state; and if the suit takes a shape which avoids this inconvenience, the object both of international and of ordinary law is attained—of the former, by respecting the personal dignity and convenience of the Sovereign; of the latter, by the administration of justice to the subject.

The universally acknowledged exceptions to the general rule of the sovereign's immunity when examined prove the truth of this proposition. For instance, the exemption from suit is admitted not to apply to immoveable property. One reason may be that the owner of such property has so incorporated himself into the jural system of the state in which he holds such property, that the argument of general inconvenience to states from allowing the exemption outweighs the argument from convenience on which the exemption in other matters is bottomed. But another reason surely is that which seems to be suggested by Jervis, C.J.,

(1) 1 W. Rob. 391. (2) 3 Maritime Law Cases 357.

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in *Taylor* v. *Best* (1), that such a suit can be carried on without the necessity of serving process upon the sovereign, or of interfering in any way with such personal property as may be requisite for the due discharge of his functions. The exemption must be taken away for one of three reasons, either those which I have suggested, or a third, that the acquisition of immoveable property amounts to a waiver of privilege. Take another instance: the sovereign who is plaintiff in a suit cannot escape from the necessity of answering interrogatories, and being subject to the service of process, and to counter-demands, such as the reconventiones of the Roman law; which law justly says, "Qui non cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones, et ad eundem judicem mitti" (Dig. l. v. t. 1–22).

So the Court of Chancery has decided that, though it will not make an order against an ambassador who does not submit to its jurisdiction, yet it will restrain a third party from giving to him a fund, the right to which is in dispute, notwithstanding his title to the fund may be absolute in law: *Gladstone* v. *Musurus Bey*. (2) And, quite recently, in 1872, in the case of *Larivière* v. *Morgan* (3), Lord Chancellor Hatherley decided that where a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, he would not refuse relief to the contractor because the contract was with a foreign government, nor because the foreign government would not appear before him; and he ordered the agents to bring the money into court, to be paid out to the contractor on his proving that he had performed his part of the contract.

All these instances of exception from the general rule of the sovereign's immunity seem to me founded upon the principle which I have stated; and, if so, why should not such proceedings in rem as have been instituted in this case be in accordance with international law? For it must be remembered that this is the law which I have to apply to this suit. No disrespect is shown, no injustice is done to the sovereign, while justice is done to the private suitor.

(1) 14 C. B. 487, 522; 23 L. J. (C.P.) 89.

(2) 1 H. & M. 495; 32 L. J. (Ch.) p. 155. (3) Law Rep. 7 Ch. 550.

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Thirdly, assuming again that the Khedive has a status which entitles him to the privilege claimed, has he by his conduct waived or forfeited that privilege? In the case of *The Swift* (1) Lord Stowell had to consider whether the King was bound by the Navigation Acts; and after stating some of the difficulties attending the solution of this question, he says: "The utmost that I can venture to admit is, that if the King traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated."

Bynkershoek, when he wrote his celebrated treatise De Foro Legatorum, complained (cap. xiv. de legato mercatore, Opera Minora, ed. 1752, p. 500) (2) that in his day the privilege of the ambassador had been greatly abused to cover the trade of the merchant.

I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was "strenue mercatorem agens," or in which, as Lord Stowell says, he ought to "traffick on the common principles that other traders traffick," (3) it is the present case; and, if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case.

It was not denied, and could not be denied, after the evidence that the vessel was employed for the ordinary purposes of trading. She belongs to what may be called a commercial fleet. I do not stop to consider the point of her carrying the mails, for that was practically abandoned by counsel. She enters an English port and is treated in every material respect by the authorities as an ordinary merchantman, with the full consent of her master; and at the time of the collision she is chartered to a British subject, and advertised as an ordinary commercial vessel. No principle of

(1) 1 Dods. 320, 339.

(2) Bynkershoek Opera Omnia, vol. 2, p. 165, ed. 1767. (3) 1 Dods. at p. 339.

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international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy to accumulate authorities for the contrary position (see especially Klüber Europ. Völkerrecht, § 210 (1), and authorities cited in note).

Upon all grounds therefore, namely,

First, that his highness the Khedive, however exalted his position and distinguished his rank, has failed to establish that he is entitled to the privileges of a sovereign prince, according to the criteria of sovereignty required by the reason of the thing, and by the usage and practice of nations as expounded by accredited writers upon international jurisprudence;

Secondly, that, on the assumption he is entitled to such privilege, it would not oust the jurisdiction of this Court in the particular proceeding which has been instituted against this ship;

And, thirdly, that, assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who claims it;

I pronounce against the protest, and I think I must in justice to the suitor give him the costs of these proceedings.

Having regard to the importance of the case, if any leave of the Court be required in order to appeal from this decision, I will readily give the requisite permission.

APPENDIX.

Firman du 13 *Février*, 1841.

L'acte de soumission que tu viens de faire, les assurances de fidélité et de dévouement que tu as données, et les intentions droites et sincères que tu as

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(1) Klüber, Droit des gens moderne de l'Europe, nouvelle édition par M. A. Ott, Paris, 1861, pp. 273, 274.

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manifestées tant à mon égard que dans les intérêts de ma Sublime Porte, sont parvenues à ma connaissance souveraine et m'ont été fort agréables.

En conséquence, et le zèle et la sagacité qui te caractérisent, ainsi que l'expérience et les connaissances que tu as acquises dans les affaires de l'Égypte pendant le long espace de tems que tu as occupé le poste de gouverneur de l'Égypte, donnant lieu à croire que tu auras acquis des droits à la faveur et à la confiance que je t'accorde, c'est-à-dire, que tu en connaîtras toute la portée et toute la reconnaissance que tu devras en avoir, que tu t'appliqueras à faire en sorte que ces dispositions passent à tes fils et à tes neveux, je t'accorde le gouvernement de l'Égypte dans ses anciennes limites telles qu'on les trouve dans la carte qui t'est envoyée par mon Grand Vizir actuellement en fonctions, munie d'un cachet, avec le privilége additionnel de l'hérédité et avec les conditions suivantes :

Désormais, quand le poste sera vacant, le gouvernement de l'Égypte écherra en ligne droite, de l'aîné à l'aîné, dans la race masculine parmi les fils et les petits-fils. Quant à leur nomination, elle se fera de la part de ma Sublime Porte.

Si jamais le destin voudra que la ligne masculine soit éteinte, comme dans ce cas ma Sublime Porte devra conférer le gouvernement de l'Égypte à une autre personne, les enfans mâles nés des filles des gouverneurs de l'Égypte n'auront aucun droit, aucune capacité légale à la succession au gouvernement.

Bien que les Pachas d'Égypte ayent obtenu le privilége de l'hérédité, ils doivent cependant être considérés, quant à la préséance, comme étant sur un pied d'égalité avec les autres vizirs, ils seront traités comme les autres vizirs de ma Sublime Porte, et recevront les mêmes titres que l'on donne aux autres vizirs quand on leur écrit.

Les principes fondés sur les lois de sûreté de la vie, de la sûreté de la propriété, et de la conservation de l'honneur, principes consacrés par les ordonnances salutaires de mon Hatti-Sheriff de Gulhané; tous les traités conclus et à conclure entre ma Sublime Porte et les puissances amies, seront complétement mis à exécution dans la province de l'Égypte aussi; et tous les règlemens faits et à faire par ma Sublime Porte seront aussi mis en pratique en Égypte, en les conciliant le mieux qu'on pourra avec les circonstances locales et les principes de la justice et de l'équité.

En Égypte, tous les impôts, tous les revenus, seront perçus et recueillis en mon nom souverain; attendu, cependant, que les Égyptiens aussi sont les sujets de ma Sublime Porte, et afin qu'un jour ils ne soient pas vexés, la dîme, les droits et les autres impôts qui seront perçus, le seront conformément au système équitable adopté par ma Sublime Porte, et l'on prendra soin de payer, dès que le temps du payement sera venu, sur les droits de douane, sur la capitation, sur les dîmes, sur les revenus et les autres produits de la province de l'Égypte, le tribut annuel dont le quantum est inséré et précisé dans un autre firman impérial. (1)

Étant d'usage d'envoyer tous les ans de l'Égypte des vivres en nature aux deux Villes Saintes, on continuera à envoyer à chaque endroit séparément les vivres et les autres objets, quels qu'ils puissent être, qui y ont été envoyés jusqu'à présent.

Comme ma Sublime Porte a pris la résolution d'améliorer la monnaie, qui est

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(1) See Samwar, Recueil Général de Traités, vol. 4, p. 490, and Correspondence relating to the Affairs of the Levant, pt. 3, p. 444.

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l'âme des opérations de la société, et de le faire de manière à ce que désormais il ne puisse y avoir de la variation ni dans l'aloi, ni dans le prix, je permets que l'on batte monnaie en Égypte; mais les monnaies en or et en argent que je te permets de battre porteront mon nom, et seront tout-à-fait semblables, sous les rapports du titre, des prix et de la forme à celles que l'on frappe ici.

En temps de paix, 18,000 hommes suffiront pour le service intérieur de la province de l'Égypte : il ne sera pas permis d'en augmenter le nombre. Mais vu que les troupes de terre et de mer de l'Égypte sont instituées pour le service de ma Sublime Porte, il sera permis, en temps de guerre, de les porter au nombre qui aura été jugé convenable par ma Sublime Porte.

On a adopté le principe que les soldats employés dans les autres parties de mes états serviront pendant cinq ans, au bout duquel terme ils seront échangés contre des recrues.

Cela étant, il faudrait qu'à cet égard l'on suivît le même système en Égypte aussi. Mais par rapport à la durée du service, on s'adaptera aux dispositions des habitans, en observant à leur égard ce que l'équité exige.

Il sera envoyé chaque année à Constantinople 400 hommes pour remplacer d'autres.

Il n'y aura aucune différence entre les marques distinctives et les drapeaux des troupes qui seront employés là, et les marques distinctives et les drapeaux des autres troupes de ma Sublime Porte. Les officiers de marine Égyptienne auront les mêmes marques distinctives de grades, et les Égyptiens auront les mêmes pavillons que les officiers et les bâtimens d'ici.

Le Gouverneur d'Égypte nommera les officiers de terre et de marine jusqu'au grade de Colonel. Quant aux nominations aux grades supérieurs à celui de Colonel, c'est-à-dire de Pachas *Miri livi* (Généraux de Brigade) et de Pachas Férik (Généraux de Division), il faudra absolument en demander la permission, et prendre mes ordres là-dessus.

Dorénavant les Pachas d'Égypte ne pourront pas faire construire des bâtimens de guerre sans en avoir demandé la permission de la Sublime Porte, et en avoir obtenu une autorisation claire et positive.

Attendu que chacune des conditions arrêtées comme ci-dessus est adhérente an privilége de l'hérédité, si une seule d'elles n'est pas exécutée, ce privilége d'hérédité sera aussitôt aboli et annulé.

Telle étant ma volonté suprême sur tous les points ci-dessus énoncés, toi, tes enfans et tes descendans, reconnaissans de cette haute faveur souveraine, vous vous empresserez toujours à exécuter scrupuleusement les conditions établies, vous vous garderez bien d'y contrevenir, vous aurez soin d'assurer le repos et la tranquillité des Égyptiens en les mettant à l'abri de toutes injures et de toutes vexations, vous ferez des rapports ici, et demanderez des ordres sur les affaires importantes qui concernent ces pays-là, étant à ces fins que le présent firman Impérial qui est orné de mon rescrit Souverain a été écrit et vous est envoyé. (1)

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(1) See Correspondence relating to the Affairs of the Levant, pt. 3, pp. 435–440. Lesur, Annuaire historique universel, 1841, app. pp. 127, 130.

Imperial Firman to the Viceroy of Egypt, settling the Mode of Succession to the Pachalic, and granting certain Privileges.

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(Après les titres d'usage.) (27th May 1866.)

Ayant pris connaissance de la demande que tu m'as soumise, et dans laquelle tu me fais connaître que la modification de l'ordre de succession établi par le Firman adressé, en date du mois de Rebiul-Akhir, 1257, à ton aïeul Mehmed Ali Pacha pour lui conférer le Gouvernement à titre d'hérédité de la Province d'Égypte, et revêtu de mon Hatt Impérial, et la transmission de succession de père en fils en ligne directe et par ordre de primogéniture seraient favorables à la bonne administration de l'Égypte et au développement du bien-être des habitants de cette Province :

Appréciant d'autre part, dans toute leur étendue, les efforts que tu as faits dans ce but depuis ta nomination au Gouvernement-Général de l'Égypte, qui est l'une des Provinces les plus importantes de mon Empire, ainsi que la fidélité et le dévouement dont tu n'as cessé de faire preuve à mon égard, et voulant te donner un témoignage éclatant de la confiance pleine et entière que je t'accorde, j'ai décidé que dorénavant le Gouvernement de l'Égypte, avec les territoires qui y sont annexés et qui en dépendent, et avec les Caïmacamies de Sévakin et de Moussawa, sera transmis à l'aîné de tes enfants mâles, et, de la même manière, aux fils aînés de tes successeurs :

Que si, en cas de vacance, le Gouverneur-Général ne laisse aucun enfant mâle, la succession sera transmise à l'aîné de ses frères, et à défaut des frères à l'aîné des enfants mâles du plus âgé parmi ses frères défunts.

Telle sera désormais la loi de succession en Égypte.

En outre, les conditions contenues dans le Firman sus-mentionné sont et demeurent à tous jamais en vigueur comme par le passé ; chacune de ces conditions sera constamment observée, et le maintien du privilége qui découle de ces conditions dépendra de l'observation intégrale de chacune des obligations qu'elles impliquent.

Les immunités accordées plus récemment par mon Gouvernement Impérial, concernant la faculté du Gouvernement-Général d'Égypte de porter jusqu'à 30,000 hommes l'effectif de ses troupes, de maintenir la différence entre le titre des monnaies frappées en Égypte en mon Gouvernement Impérial, et celui des autres monnaies de mon Empire, et de conférer les grades civils de mon Gouvernement jusqu'à celui de Sanié (second rang de la première classe), sont également confirmées.

La règle qui interdit la succession des descendants mâles des filles des Gouverneurs est maintenue comme par la passé.

Le tribut de 80,000 bourses payé par l'Égypte au Trésor Impérial est porté à 150,000 bourses, à partir du mois de Mars de l'année 1866, à raison de 100 piastres la livre Ottomane, c'est-à-dire, à 750,000 livres Ottomanes par an.

Mon Iradé Impérial étant émané à l'effet de mettre à exécution les conditions qui précèdent, le présent Firman, portant en tête mon écriture Impériale, a été rédigé par ma Chancellerie Impériale, et t'a été délivré.

Tu dois, de ton côté, avec la loyauté et le zèle qui te caractérisent, et en profitant des connaissances que tu as acquises des conditions de l'Égypte, consacrer tes soins à la bonne administration de cette contrée, travailler à assurer à ces popula-

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tions une tranquillité et une sécurité entières; et, reconnaissant la valeur du gage que je viens de te donner de ma faveur Impériale, t'attacher à l'observation des conditions établies ci-dessus.

Écrit le douzième jour du mois de Moharem de l'an de l'Hégire 1823 (May 27, 1866). (1)

Imperial Firman to the Viceroy of Egypt, settling the Mode of appointing a Regency on his dying before his Son has attained the Age of 18 *Years.*

(15th June, 1866.)

Dans le but de garantir, de toutes manières, le nouvel ordre de succession au Gouvernement de l'Égypte, ainsi qu'il fut établi par un autre Firman Impérial, il est mentionné ci-dessous le mode d'après lequel l'on est tenu de procéder a l'institution de la tutelle du Gouvernement de l'Égypte, lorsque dans l'éventualité de la mort de son Gouverneur, son fils aîné et héritier se trouverait être encore en bas âge.

Dans l'éventualité de la vacance du Gouvernement, et lorsque l'héritier du Gouvernement serait en bas âge, c'est-à-dire, qu'il aurait moins que 18 ans, le Firman d'investiture sera toute de même émané. Cependant, jusqu'à ce qu'il arrive à l'âge de 18 ans, si le Gouverneur se trouverait avoir déjà établi un tuteur et un conseil de tutelle pour le Gouvernement moyennant un testament cacheté par lui, et par deux hauts fonctionnaires de l'Égypte en service actif, comme témoins, ce tuteur et ce personnel de tutelle saisiront immédiatement les rênes de l'administration, et procéderont à diriger le Gouvernement. En même temps, comme ils en réfèreront à ma Sublime Porte, un Firman Impérial en sera émané, les confirmant à leur place. Si, d'un autre côté, survient une vacance du Gouvernement susdit sans qu'il soit pourvu à l'institution d'une telle tutelle, le Conseil de tutelle étant composé des Chefs de l'Administration de l'Intérieur, de la Guerre, des Finances, des Affaires Étrangères, de la Justice, du Chef des Troupes et des Commissaires des Provinces Égyptiennes, on procédera à l'élection, parmi les susdits fonctionnaires, d'un Conseil de tutelle de la manière suivante:—

Les susdits fonctionnaires réuniront immédiatement, et choisiront parmi eux-mêmes un tuteur à l'unanimité, ou à la pluralité des voix. Si, cependant, les voix se partagent entre deux candidats, la préférence sera donnée à celui des deux qui occuperait les plus importantes fonctions dans le Gouvernement. Le degré d'importance est établi dans l'ordre indiqué ci-dessus.

Ainsi, vient d'abord le Chef du Département de l'Intérieure, après celui de la Guerre, et ainsi de suite. Le tuteur étant ainsi élu, et les autres Membres s'étant constitués en Conseil de tutelle, ils prendront en mains le Gouvernement, et ils s'empresseront de rapporter à ma Sublime Porte l'institution du tuteur et l'institution du Conseil de tutelle. Ce choix sera confirmé de notre part par un Firman Impérial.

Dans le cas qu'il arrive que l'ex-Gouverneur ait nommé un tuteur et un Conseil du tutelle, ce tuteur et ce Conseil ne saurait être changés avant que le terme de tutelle ne soit expiré. De même dans la seconde alternative, c'est-à-dire,

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(1) See State Papers, vol. 56, p. 1167, and Archives diplomatiques. Recueil de diplomatie et d'histoire, 1866, Paris, tom. 4, p. 170.

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lorsque l'institution du tuteur a lieu par la réunion des hauts fonctionnaires du Gouvernement, l'on ne pourra non plus changer le tuteur ainsi nommé. Lorsqu'un Membre du Conseil du tuteur vient à mourir, on choisira un autre à sa place parmi les hauts fonctionnaires du Gouvernement, et si le tuteur lui-même vient à mourir on choisira un à sa place de la manière sus-indiquée, dans le Conseil de tutelle, substituant à celui-ci un des hauts fonctionnaires du Gouvernement.

Lorsque l'héritier arrive à l'âge de dix-huit ans, étant alors majeur, saisira les rênes de l'Administration et gouvernera comme son prédécesseur. Ceci étant confirmé par ma volonté Impériale et revêtu de mon Hatti-Sheriff, le présent Firman fut conséquemment émané le 2 Safer 1283 (15 Juin, 1866).

Firman addressed to the Viceroy of Egypt, dated 5 *Sefer* 1284 (*June* 8, 1867).

(Translation.)

To my illustrious Vizier Ismaïl Pasha, who now holds the rank of Grand Vizier, with the title of "Khidev" of Egypt, and who is decorated with the orders of the Medjidié and Osmanié of the First Class in diamonds. May God perpetuate his glory, and increase his power and prosperity. (1)

Be it known on the arrival of this my imperial firman, that, as is also mentioned in my firman granting the privilege of hereditary succession to the Viceroyalty (Kidiviet) of Egypt, those fundamental laws which are in force in other parts of my dominions shall be maintained and respected in Egypt. Now by fundamental laws are meant all those principles laid down in the imperial Rescript of Gulhaneh. But, inasmuch as the internal administration of the province, and consequently its financial, material, and other interests are confided to the Government of Egypt, in order to preserve and extend those interests, it is permitted to that Government to frame such regulations as may seem necessary in the form of "special Tanzimat for the interior." In like manner, whilst all the treaties of the Sublime Porte must be respected in Egypt, an exception is made only as regards the customs duties, and as regards foreigners in matters relating to the police, postal, and transit services, for which full powers are given to thee to enter into special arrangements with foreign agents. But such arrangements must not take the form of treaties or conventions having any political signification or purport. And in the event of their being inconsistent with the principles laid down above, or opposed to my original sovereign rights, it will be necessary to hold them as null and void. (2)

Wherefore the question of conformity or non-conformity to these principles in matters where a doubt exists as regards Egypt must be referred to my Sublime Porte previously to such arrangements being concluded.

And when in the manner explained above any special arrangements are entered into concerning the customs duties in Egypt, information thereof must be transmitted to my Sublime Porte.

Also, when any conference respecting commercial treaties takes place between

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(1) A whole string of epithets, applied to all Pachas holding the rank of Vizier, is omitted.

(2) "Non avenus" is more literal.

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my government and other powers, in order that the commercial interests of Egypt may be attended to, the opinions of the Egyptian Administration shall be consulted thereon.

In proclamation of which this my imperial firman, dated 5 Sefer, 1284, is now addressed to thee. (1)

Firman addressed to the Viceroy of Egypt, November 29, 1869.

(Après les titres d'usage.)

Il est superflu de dire combien ma sollicitude est grande pour la prospérité de l'importante Province d'Égypte, et pour l'accroissement du bien-être et de la sécurité de ses habitants. Tout en consacrant une attention sérieuse au maintien intact des priviléges intérieurs accordés à l'Administration Égyptienne, il est de mon devoir de surveiller en même temps le strict accomplissement des obligations de cette administration, soit envers ma Couronne, soit envers les habitants de la province.

En conséquence, j'ai accepté les éclaircissements que tu as donnés et les engagements que tu as pris relativement aux armes et aux bâtiments de guerre, ainsi qu'à l'égard des relations extérieures de la province, par la lettre que tu as écrite, sous la date du 10 Djémazi-ul-Ewel, 1286 (2), en réponse à celle que mon Grand Vizir t'avait adressé, par mon ordre souverain, le 18 Rébi-ul-Akhir, 1286. (3)

Seulement la question financière étant un point vital pour tous les pays, si la quotité des impôts est supérieure aux moyens des contribuables, ou si les produits de ces impôts, au lieu d'être affectés aux besoins réels du pays, sont absorbés par des dépenses infructueuses, on s'expose incontestablement à des pertes et à des dangers incalculables.

Il en résulte pour le Souverain du pays le droit sacré et imprescriptible de surveiller avec sollicitude cet important objet; et, pour qu'il ne subsiste plus aucun doute ni mal-entendu à cet égard, j'ai décidé de te donner les éclaircissements suivants, qui seront également portés à la connaissance de tous. Ainsi, suivant les conditions fondamentales qui servent de base à l'Administration Égyptienne, tous les impôts et redevances doivent être répartis et perçus en mon nom. Je ne saurais donc consentir en aucune manière à ce que les sommes provenant de ces impôts soient employées autrement qu'aux besoins réels du pays, et à ce que les habitants soient chargés de nouveaux impôts sans une nécessité légitime et reconnue. Ma volonté absolue est donc que tes soins et ton zèle les plus incessants soient dirigés vers ces deux importants objets, aussi bien que sur la nécessité que mes sujets d'Égypte soient toujours traités avec justice et équité.

De même, les emprunts à l'étranger engageant pour de longues années les revenus du pays, je ne saurais admettre que, sans que tous les détails des raisons qui peuvent y faire recourir n'ait été soumis á mon Gouvernement Impérial, et

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(1) See Firman donné par le Sultan au vice-roi d'Égypte en date de Constantinople, juin 1867. Archives diplomatiques, 1868, tom. 2, p. 452.

(2) See Annual Register, 1869, p. 273.

(3) See Archives Diplomatiques, 1869, tom. 3, 1321.

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sans que mon autorisation n'aient été préalablement obtenue, des sommes prélevées sur les revenus de l'Égypte soient affectées au service d'un emprunt.

Ma volonté est donc qu'en aucun temps il ne soit fait d'emprunt qu'après que la nécessité absolue d'y avoir recours sera bien établie, et mon autorisation préalable obtenu.

Tu conformeras désormais tes actes et ta conduite aux termes formels de mon présent firman impérial, qui est en tout point conforme aux droits et aux devoirs respectifs, ainsi qu'aux précédents.

Le 22 Chaban, 1286.

Solicitors for defendants: *McLeod & Watney.*

Solicitors for plaintiffs: *Clarkson, Son, & Greenwell.*

[IN THE ARCHES COURT OF CANTERBURY.]

1873

April 28.

THE OFFICE OF THE JUDGE PROMOTED BY RICHARDS *v.* FINCHER.

Church Discipline Act (3 & 4 *Vict. c.* 86, *ss.* 19–23)—*Letters of Request—Officiating without Leave—Offertory Alms—Suit in Form Criminal having the Effect of establishing a Civil Right.*

A suit promoted by the vicar of the parish against a clerk in holy orders for officiating without leave in a chapel in such parish can only be carried on in the mode prescribed by the 23rd section of the Church Discipline Act.

Letters of request signed by the chancellor of the diocese calling upon the Judge of the Arches Court to entertain such a suit held to be invalid.

THIS case came before the Court on a motion to accept letters of request signed by the chancellor of the diocese of Winchester in an intended proceeding at the promotion of the Rev. William Henry Richards, vicar of the vicarage and parish church of St. Helen's, in the Isle of Wight, in that diocese, against the Rev. Joseph Guillemard Fincher, of Sea View, in the same parish.

The following is the material part of the letters of request:—

Whereas the Rev. William Henry Richards, clerk, vicar of the vicarage and parish church of St. Helen's, in the Isle of Wight, in the diocese of Winchester, in the province of Canterbury, doth intend to institute a cause against the Rev. Joseph Guillemard Fincher, of Sea View, in the parish of St. Helen's, in the Isle of Wight aforesaid, who has within the last two months, without the leave and contrary to the express injunction of the said Rev. W. H. Richards, officiated as a clergyman of the Church of England in a chapel in connection with the Established Church called Sea View Chapel, situate in the parish of St. Helen's aforesaid, and performed therein the offices of the Church to divers parishioners

For subsequent proceedings see post, 253

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of the said parish, and collected therein offertory alms, and administered the same, and visited divers parishioners of the said Rev. W. H. Richards residing in the said parish. And whereas the said Rev. W. H. Richards hath alleged that he intends to institute the said cause for the purpose of asserting his civil rights as vicar of the said parish against the invasion thereof by the said Rev. J. G. Fincher. And whereas the said Rev. W. H. Richards has requested me, Charles Sumner, vicar general of the Right Rev. Father in God Samuel, by divine permission, Lord Bishop of Winchester, and official principal of the Episcopal and Consistory Court of Winchester, to grant letters of request, so that he may commence the said cause in the Arches Court of Canterbury. And whereas instituting the said cause in the said Arches Court of Canterbury will be of advantage to both the parties therein, not only from the better assistance they can there have of advocates and proctors than in the Consistory Court of Winchester, but as the same will be a more ready and expeditious way of hearing and finally determining the said cause: These are therefore, at the desire of the said Rev. W. H. Richards, to request you, the Right Honourable the Official Principal of the Arches Court of Canterbury, to issue a citation or decree under the seal of the said Court, calling upon the said J. G. Fincher to appear before you, or your surrogate, or any other competent judge in this behalf, to answer to certain articles to be administered to him at the suit of the said W. H. Richards, more especially for publicly reading prayers, administering the holy sacraments, and performing other ecclesiastical duties and divine ceremonies of the Church of England; and also for appropriating the alms collected at the offertory in a certain chapel situate in the parish of St. Helen's, in the Isle of Wight aforesaid; and also for visiting ministerially divers parishioners of the said parish without the authority of, and contrary to the injunction of, the said W. H. Richards, the vicar of the said parish, and in breach of the ecclesiastical laws of this realm: and to hear and determine the said cause according to law.

Dr. Tristram appeared for the Rev. W. H. Richards, and prayed the judge (ex parte) to accept the letters of request.

The object of the intended suit is for the purpose of asserting the civil rights of Mr. Richards as vicar of St. Helen's, and the letters of request have accordingly been signed by the chancellor, and not by the bishop of the diocese.

[SIR ROBERT PHILLIMORE referred to the 23rd section of the Church Discipline Act, 3 & 4 Vict. c. 86, and to the *Dean of York's Case*. (1)]

It is true that the 23rd section of the Church Discipline Act enacts that "no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or pro-

(1) 2 Q. B. 1.

vided," that is otherwise than in the manner prescribed by the Act itself; but the 19th section of the same statute expressly permits of any suit which, though in form criminal, may have the effect of asserting or establishing any civil right, being instituted in such form and manner, and in such court, as would have been possible under the law as it existed previous to the passing of the Act. The provisions of the 19th section must receive some application, and must refer to some suits instituted in a criminal form. In the case of *Braithwaite* v. *Hook* (1), which was a case in some respect analogous to the present, although the proceedings were, ex nimiâ cautelâ, in the criminal form, it was at the time considered that the suit might have been in the civil form.

[SIR ROBERT PHILLIMORE. The latest case analogous to the present is that of *Liddell* v. *Rainsford.* (2) In that case, in accordance with the suggestion of Sir Travers Twiss, the Judge of the Consistory Court of London, proceedings were ultimately taken in a civil form. The offence there charged was unlawfully appropriating offertory alms, but the application now made in this case goes much further. I am asked to issue a decree by letters of request calling upon the defendant to answer certain articles for publicly reading prayers, administering the holy sacraments, and performing other ecclesiastical duties and divine ceremonies without the authority, and contrary to the injunctions of the vicar of the parish. This is an ecclesiastical offence, and not merely an infringement of the civil rights of the incumbent.]

The proceedings in cases of this nature have usually been by articles in a criminal form, though, in fact, nothing but a settlement of the civil rights of the parties may have been sought to be obtained thereby: *Moysey* v. *Hillcoat* (3); *Bliss* v. *Woods.* (4)

[SIR ROBERT PHILLIMORE referred to *Molyneux* v. *Bagshaw.* (5)]

If the provisions of s. 19 are to have any application at all, they would clearly seem to be applicable to a case like the present.

SIR ROBERT PHILLIMORE. If the suit intended to be instituted should be limited to the establishment of the pecuniary rights of

(1) 8 Jur. (N.S.) 1186.
(2) 37 L. J. (Eccl.) 83.
(3) 2 Hagg. Eccl. 30.
(4) 3 Hagg. Eccl. 486.
(5) 9 Jur. (N.S.) 553.

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the incumbent, it then clearly would be a civil suit, and all difficulty with regard to the proceedings not having been taken in accordance with the provisions of the 23rd section of the Church Discipline Act (3 & 4 Vict. c. 86), would be obviated, but here, according to the letters of request before the Court, much more than the pecuniary rights of the promoter are involved. This lets in the difficulty I have before alluded to. Ought not the letters of request to have been signed by the bishop of the diocese under the section (3 & 4 Vict. c. 86, s. 23) I have referred to, and not by his chancellor under the old law? One of the charges disclosed on the letters of request now before me is that the defendant has officiated in a chapel within the parish of the promoter without his authority, and contrary to his injunctions. If one clergyman so interferes with the pastoral rights of another, he must have offended against the laws ecclesiastical within the meaning of those words in the 23rd section of the Church Discipline Act. The object of the present proceedings does not appear to be merely confined to an enforcement of the civil rights of the promoter, as was the case in *Liddell* v. *Rainsford*. (1) If the suit were brought simply for the recovery of the offertory money alleged to have been wrongfully received, it may be that letters of request might rightly be signed by the chancellor of the diocese, and that this Court would have jurisdiction to accept them. But the matter at present before the Court is not to be treated lightly. I am asked to issue a decree by letters of request calling upon Mr. Fincher to appear to answer articles to be administered to him for performing certain specified acts in breach of the ecclesiastical laws of this realm. If these charges are to be persisted in, I am of opinion that the letters of request must come from the bishop of the diocese, under the provisions of the Church Discipline Act, and not from his chancellor. It must be remembered that, according to the case now presented to me, the establishment of civil rights is not the only thing sought by the promoter, but that he also seeks to establish a spiritual right. In the case of *The Duke of Portland* v. *Bingham* (2) Lord Stowell held that no sufficient interest had been shewn by Lord Portland, as impropriator and lay rector of the parish of St. Mary-le-bone, to enable him to

(1) 37 L. J. (Eccl.) 8.

(2) 1 Hagg. Cons. 157.

maintain a civil suit having for its object the revocation of a licence to preach in a chapel within the parish, and observed that the usual and most convenient way of trying such matters was by criminal articles exhibited in due form. The civil suit was afterwards abandoned, and criminal articles were exhibited. They were at first opposed, but ultimately the cause was discontinued. (1)

In the present case there appear to be two courses open to the promoter: either he may limit himself to the charge against the defendant, of unlawfully appropriating the offertory money collected in Sea View Chapel, and to the institution of a civil suit for refusing to pay over such offertory money; in which case I should, perhaps, be of opinion that letters of request, signed by the chancellor of the diocese, would be good, though as to this I can make no decision, as the case is not before me; or to take proceedings, not only for the establishment of his civil rights, but also for preventing the defendant interfering with his spiritual rights as vicar of the parish. I am of opinion that I cannot accept the present letters of request, as they have not been signed by the bishop of the diocese, in accordance with the provisions of the Church Discipline Act. In the case of *Liddell* v. *Rainsford* (2), Sir Travers Twiss appears to have held this opinion; and, in fact, since the passing of the Church Discipline Act, there have been many cases having for their object the establishment of civil rights; yet always in such cases, where the proceedings have been by letters of request to this Court, the letters of request have been signed by the bishop.

I shall order the case to stand over, in order that Dr. Tristram may have time to consider which of the two courses I have suggested he will prefer to adopt.

Proctors for promoter: *Moore & Currey.*

(1) See note, 1 Hagg. Cons. 169.

(2) 37 L. J. (Eccl.) 83.

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July 18.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY BURCH AGAINST REID.

Practice—Proctor—Solicitor.

1 PD 302. 303, 4-5,

A defendant in a suit in the Arches Court of Canterbury cannot enter an appearance otherwise than in person or by a proctor.

THIS was a criminal proceeding at the promotion of Arthur Burch against the Rev. John Reid, clerk, vicar of the vicarage and parish church of St. James and Cuby, alias Tregony, in the diocese of Exeter. A commission of inquiry under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86) had been issued by the Bishop of Exeter for the purpose of making inquiry as to offences against the laws ecclesiastical alleged to have been committed by Mr. Reid, and the commissioners, having duly reported that there was sufficient primâ facie ground for instituting further proceedings, the case was sent by letters of request, signed by the bishop, to the Court of Arches. The Judge of the Court of Arches accepted the letters of request and a decree by letters of request issued in the usual form, citing Mr. Reid to enter an appearance personally, or by his proctor duly constituted in the registry of the Court of Arches, on the sixth day after service. The decree was duly served, but no appearance was entered within six days of the return of the decree either by the defendant in person or by any proctor of the Court on his behalf.

Dr. Tristram, on behalf of the promoter, now moved the Court to order the defendant to enter an appearance forthwith. (1)

Arthur Charles applied to the Court on behalf of the defendant to allow an appearance to be entered for the defendant by Mr. Edward Lee Rowcliffe, a solicitor. The defendant has delayed entering an appearance within the time fixed by the rules of the Court in order to obtain the opinion of the Court upon the question whether, having regard to the existing state of the law, solicitors should not be admitted to practise in the Court of Arches. The

(1) See Rule 5 of the Rules and Regulations to be observed in Causes instituted in the Arches Court of Canterbury.

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Court has considered it right that barristers should be permitted to practise before it, notwithstanding that members of the College of Advocates still exercise their profession, and the Archbishop of Canterbury still possesses power to admit advocates: 2 Phillimore's Ecclesiastical Law, p. 1219. No reason can be shewn why a similar course should not be followed with respect to solicitors. It may be said that the fact that the statutes 20 & 21 Vict. c. 77, 20 & 21 Vict. c. 85, 22 & 23 Vict. c. 6, having been passed for the express purpose of opening the Courts of Probate, Divorce, and Admiralty to all branches of the profession, would lead to the inference that a statute would be required to open this Court, but it must be borne in mind that just as barristers have been admitted here by the discretion of the Court, so in like manner it must be equally competent to the Court to admit solicitors.

It may be said, indeed, that the 20th section of 33 & 34 Vict. c. 28, contains a prohibition against any person other than a proctor being admitted to perform proctorial acts in the Provincial Courts of the Archbishops of Canterbury and York and the Diocesan Court of the Bishop of London; but this is not so, for that section does not take away the power those Courts undoubtedly possess of designating by order of Court the persons to conduct business before them. The time has clearly arrived when solicitors ought, from considerations of convenience, if from no other reasons, to be admitted to practise in the Ecclesiastical Courts. Solicitors are now permitted to practise before the Judicial Committee of the Privy Council in ecclesiastical appeals. In the case of *Voysey* v. *Noble* (1) the respondent was allowed to appear by a solicitor, and subsequently, in March, 1871, an order in council was issued (2), in accordance with which solicitors, on signing a roll in the Privy Council office, became competent to practise in all business before their Lordships.

[SIR ROBERT PHILLIMORE. There was no express rule preventing solicitors practising in ecclesiastical causes before the Court of Delegates.]

Inasmuch as solicitors may conduct business in the episcopal

(1) Law Rep. 3 P. C. 357.

(2) Given in the Appendix to Macpherson's Privy Council Practice, p. 68.

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courts in the country, 33 & 34 Vict. c. 28, s. 20; and in the final court of appeals, it would surely be convenient that suitors should have the benefit of having their causes conducted by solicitors in this Court, and be able to retain the same adviser at all stages of a suit. At all events, it will be necessary that some such rule of Court as that now suggested should be made sooner or later, as the number of proctors is of necessity decreasing.

Dr. Deane, Q.C., opposed the application on behalf of proctors practising in the Court of Arches. In *Noble* v. *Voysey* (1) the objection as to the respondent appearing by a solicitor was taken, but waived by the promoter. Any rule which might be made by the Court as to the admission of solicitors would, if acted on, entail on the solicitor performing proctorial acts a personal liability, for any solicitor acting as a proctor would not be protected by any rule of practice this Court might make, but would still be liable to a penalty under 53 Geo. 3, c. 127. Indeed, it is obvious that 33 & 34 Vict. c. 28, s. 20 was passed to do away with the penalties under this Act of Geo. 3, so far as the country Diocesan Courts were concerned, but leaving the penalty still existing with respect to the chief Ecclesiastical Courts. Why this Court, the Chancery Court of York, and the Consistory Court of London, were so excepted out of the enactment is obvious; namely, that the vested rights of the persons who had been admitted as proctors in the three Courts named might be preserved, whilst, in the remaining courts, the case was different, owing to the scarcity of proctors in the country. A statute has always been passed whenever it has become necessary that a court should be thrown open. The proper course will be, when the staff of proctors attached to this Court is exhausted, for the Legislature to pass an act allowing solicitors to practise here, but at present there are no less than forty proctors competent to practise in the Court, and, therefore, no necessity can be proved to exist for altering the established practice of the Court, which forbids any proctorial acts to be done by any person other than a proctor. The Court has no discretion in the matter, for it is impossible to put any reasonable construction on the 20th section of 33 & 34 Vict. c. 28, unless it is one which would restrict

(1) Law Rep. 3 P. C. 357.

the practice in the Archiepiscopal Courts and the Consistory Court of London to persons who have been admitted as proctors in these Courts.

Charles, in reply. The statute of Geo. 3 was not passed to bind the discretion of the Court as to the persons who should be admitted to practise before it, for the reason of the enactment was obviously to do away with the mischief of proctors doing proctorial acts when they had not been enrolled as proctors of the Court.

SIR ROBERT PHILLIMORE. This case came before the Court by letters of request from the Bishop of Exeter. It is a criminal proceeding against a clerk in holy orders, under the provisions of the Church Discipline Act. The letters of request have been accepted by this Court, and a decree by letters has issued, the material portion of which is in the following words:—

"And whereas we have accepted the said letters of request, we do therefore enjoin and command you jointly and severally to cite or cause to be cited the said Reverend John Reid, clerk, vicar of the vicarage and parish church of St. James and Cuby, alias Tregony, in the diocese of Exeter and province of Canterbury, to enter an appearance personally or by his proctor duly constituted in the registry of our said Court, situate at No. 3, Godliman Street, Doctors' Commons, London, on the sixth day after he shall have been served with these presents."

The application which is now made to the Court is one which, in the language we are accustomed to use in this Court, is primæ impressionis. It is that the Court should make a rule allowing the defendant to appear by a solicitor, and not by a proctor. It has been urged upon me that I have a discretion to make a rule of Court to that effect, and that in the exercise of a wise discretion I should make such an order in the state of circumstances now existing, owing to the alteration which has lately taken place in the law. The first question before me is this: has the Court any discretion in the matter to make the order required? for it is admitted that unless the Court does make an order of Court allowing the defendant to appear by a solicitor, he must appear either in person or by a proctor practising in this Court. And

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here it will be not unimportant to observe that in the case of *Fell* v. *Bond and Others* (1), where an appeal was brought to the Court of Arches from a decree of the Chancellor of Lichfield, appointing certain persons to be proctors in his court, one of my predecessors in this chair—Sir Herbert Jenner Fust—held, that it was not within the competence of the Court to alter the practice and usage which had obtained in the Court of Lichfield with regard to the admission of proctors in the way that the Chancellor of Lichfield had thought he had power to do, and accordingly reversed the decree appealed from, observing in his judgment as follows:—"In the absence of evidence to the contrary, I consider there is quite sufficient before the Court to justify me in assuming that it has been and still is the invariable practice that those, who claim to be admitted as proctors at Lichfield, shall have previously served under articles a practitioner in that Court. Upon these grounds, I am of opinion that the decree of the chancellor cannot be sustained."

But the point with which I have now to deal depends not only upon usage, but upon the construction which has to be given to several statutes. The first of these which I shall refer to is the 53 Geo. 3, c. 127. s. 9, a part of the title of which is "an Act for the better Regulation of Ecclesiastical Courts in England." The 9th section of that Act enacts, "that from and after the passing of this Act in case any person or persons shall, in his or in their own name, or in the name of any other person or persons, make, do, act, exercise, or perform any act, matter, or thing whatsoever in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, functions, or practice of a proctor, without being admitted and enrolled, every such person for every such offence shall forfeit and pay the sum of fifty pounds, to be sued for and recovered in manner hereinafter mentioned," and the Act goes on to make an exception in the next, the 10th section, that clerks who have been employed for seven years shall be not held

(1) 1 Robert. 740.

liable under s. 9. (1) I cannot assent to the argument of Mr. Charles, that s. 9 would not apply to any person, except to a proctor, who has not been admitted or enrolled, and that it would not render any solicitor, not being a proctor, who should perform proctorial acts liable to the penalty imposed by its provisions. I cannot see my way to making an order of court, when persons acting under such order would contravene an Act of Parliament and would render themselves liable to a penalty.

At the time when the Court of Probate and the Court of Divorce and Matrimonial Causes were established, it was found necessary to make certain regulations as to the persons by whom the business before the courts should be conducted, and therefore, by the 45th section of 20 & 21 Vict. c. 77, it was provided as follows:—"All solicitors and attorneys at law may practise in the Court of Probate, and the laws and statutes now in force concerning solicitors and attorneys shall extend to solicitors and attorneys practising in the said court; and the commissioners for taking oaths in the High Court of Chancery shall be commissioners for taking oaths in the Court of Probate."

The 15th section of 20 & 21 Vict. c. 85, provided what persons should be entitled to practise in the Court of Divorce and Matrimonial Causes in the following terms: "All persons admitted to practise as advocates or proctors respectively in any Ecclesiastical Court in England, and all barristers, attorneys and solicitors entitled to practise in the superior courts at Westminster, shall be entitled to practise in the Court of Divorce and Matrimonial Causes, and such advocates and barristers shall have the same relative rank and precedence which they now have in the Judicial Committee of the Privy Council unless and until Her Majesty shall otherwise order."

The statute 22 & 23 Vict. c. 6, is the next statute I think it right that I should refer to, and here I may observe that the fact of that statute having been passed is very remarkable as tending to shew the necessity there exists of applying to the Legis-

(1) The 9th section of 53 Geo. 3, c. 127, is identical in terms with the 10th section of 54 Geo. 3, c. 68 (An Act for the better Regulation of Ecclesiastical Courts in Ireland . . . .) The case of *Stephenson* v. *Higginson*, 3 H. L. C. 638, is a decision on the 10th section of the Irish Act.

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lature in order to take away the exclusive privilege persons may possess of practising in any special court, for in that statute it was found necessary to make an express provision for opening the Court of Admiralty to all barristers and solicitors; the first section enacting: "All serjeants and barristers at law, and all attorneys at law and solicitors, shall, from and after the passing of this Act, be entitled to practise as serjeants, barristers, attorneys, and solicitors respectively in all matters and causes whatsoever in Her Majesty's High Court of Admiralty, and the said serjeants and barristers at law shall and may have and exercise the same rights and privileges of practising, pleading, and audience in the said High Court of Admiralty as advocates now have and enjoy in the said Court, and the said attorneys and solicitors shall and may have and exercise the same rights and privileges of practising in the said High Court of Admiralty as proctors now have and enjoy in the said Court; and all persons who at the time of the passing of this Act shall have been admitted advocates in any of the ecclesiastical Courts, or in the said High Court of Admiralty, and the said serjeants and barristers at law shall have respectively the same rank and precedence in the said High Court of Admiralty which they now have before the Judicial Committee of the Privy Council, unless and until Her Majesty otherwise order, provided always that all attorneys at law and solicitors practising in the said High Court of Admiralty shall be subject to the authority of the judge of the said Court, in like manner as attorneys in the Court of Queen's Bench are subject to the authority of that Court."

The next statute it will be necessary to refer to is 33 & 34 Vict. c. 28; that statute, in its 20th section, provides that: "From and after the passing of this Act, it shall be lawful for an attorney or solicitor to perform all such acts as appertain solely to the office of a proctor, in any Ecclesiastical Court other than the Provincial Courts of the Archbishops of Canterbury and of York and the Diocesan Court of the Bishop of London, without incurring any forfeiture or penalty, and to make the same charges which a proctor would be entitled to make, and to recover the same, any enactment or enactments to the contrary notwithstanding."

On reading this section, and bearing in mind that the 9th section I have read of 53 Geo. 3 c. 127 is still in force, I cannot

see how the argument can be maintained that a solicitor practising in this court would not be subject to the penalty imposed by its terms, or that the section of the last Act does not recognise that proctors have an exclusive privilege of practising in the Provincial Courts of the Archbishops of Canterbury and York, and the Diocesan Court of the Bishop of London.

I think the statute was passed for the express purpose of taking away the penalty which would otherwise, under 53 Geo. 3, c. 127, s. 9, have been incurred by any solicitor who should act as a proctor in any Ecclesiastical Court other than those I have mentioned. It would be a strange construction of the section, that an enactment obviously intended to provide for a removal of the restrictions which prevented the performance of proctorial acts by solicitors in certain Ecclesiastical Courts, other than the Provincial Court of the Archbishop of Canterbury and York and the Diocesan Court of the Bishop of London, did not carry with it a continuation of those restrictions, so far as regards the courts so expressly excepted. For these reasons I do not think I ought to accede to the application now made to me. I think I have no discretion in the matter. I do not offer any opinion as to whether at a future time it may or may not be necessary that solicitors should be permitted to practise in this court. That will be a question for the Legislature. At present I am of opinion there is at least no absolute necessity, as I understand the fact to be, as stated, that there are now not less than forty proctors competent to practise in this court. I have come to the conclusion that I have no power to make a rule admitting persons other than proctors to practise in this court, and it is admitted that the old rule still in force does not allow proctorial acts to be performed by any person who has not been admitted a proctor of the court. Perhaps I ought not to leave quite unalluded to the argument which has been addressed to me by Mr. Charles, with reference to the practice which has obtained of allowing barristers to be heard in Ecclesiastical Courts and the recent order of council allowing solicitors to be retained to conduct ecclesiastical cases before the Judicial Committee of the Privy Council. It is true that barristers have been admitted on the same footing as advocates in the Ecclesiastical Courts, but it will be perhaps found to be the case that the practice

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of barristers being brought into these courts sprung from motives of courtesy. (1) If I remember aright, Lord Mansfield, when Mr. Murray, was admitted by favour to argue in an Ecclesiastical Court. However this may be, I am satisfied that no statute exists which restricts the practice in the Ecclesiastical Courts to advocates, and prevents barristers being employed in those courts, but the case as to solicitors has always been different. By the old practice of the Ecclesiastical Courts, solicitors who were not proctors were never allowed to act as proctors, till the statute of 1870 withdrew the prohibition with respect to certain Ecclesiastical Courts. Under these circumstances the analogy that has been attempted to be set up from the fact of barristers being permitted to appear here, does not avail, and I think I must adhere to the view I have taken as to there being no power in the Court to make any addition to the rule of Court which is now in force, requiring the defendant to appear either in person, or by a proctor.

I must therefore refuse the application.

Proctors for promoter: *Brooks & Co.*

Proctors for proctors opposing the application: *Moore & Currey.*

July 1.

THE CHARKIEH. (6200.)

Ship—Security to answer Judgment—Damage—Principal Suit in rem—Cross Suit in personam—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 34.

The steamship *B.* and the steamship *C.* came into collision in the Thames. Both sustained damage, and the *B.* sunk and became a total loss. The owners of the ships were foreigners residing abroad. A suit in rem was instituted against the *C.* by the owners of the *B.* A cross suit in personam was afterwards instituted by the owner of the *C.* against the *B.* On application made on behalf of the owner of the *C.* the Court ordered the proceedings in the case against the *C.* to be stayed until security had been given by the owners of the *B.* to answer judgment in the cause instituted against the owners of the *B.*

THIS was a cause of salvage instituted on behalf of the owners of the steamship *Batavier* against the *Charkieh* to recover damages caused by a collision in the Thames between the *Batavier* and the *Charkieh.* So much damage was done to the *Batavier* by the

(1) See Oughton, Ordo judiciorum prolegomena, xxxiii.

collision that she sunk immediately afterwards. The *Charkieh* was arrested, and remained under arrest. (1) A cross suit in personam having been instituted on behalf of His Highness the Khedive of Egypt, the owner of the *Charkieh*, against the owners of the *Batavier*, the solicitors of the owner of the *Charkieh* gave notice of motion to move the judge "to order that all proceedings in the cause of *The Charkieh* should be suspended until an appearance had been entered and security given to answer judgment in the cause of *The Batavier*."

In support of the motion an affidavit was filed, which stated that the *Batavier* was owned by the Netherlands Steamship Company, "a foreign company domiciled and having their principal place of business in the kingdom of Holland," and that the *Batavier* had broken up and become a total wreck, and could not be arrested; that a citation had been issued directed to the Netherlands Steamship Company, and had been served upon the solicitors acting for the said company in the cause of *The Charkieh*, and that they had declined to enter an appearance in the cause of *The Batavier*.

Gibson moved in pursuance of the notice of motion. The service of the citation on the solicitors acting for the owners of the *Batavier* in the cause of *The Charkieh* is a good service according to the rules of the Court: Admiralty Court Rules, 171. The 34th section of the Admiralty Court Act, 1861, provides specially for such a case as the present: *The Seringapatam* (2); *The North American* (3); *The Heart of Oak.* (4) Justice requires that security should be given by the owners of the *Batavier* because they have, by arresting the *Charkieh*, obtained security in the suit in which they are plaintiffs, and it is out of the power of the owner of the *Charkieh* to arrest the *Batavier*. It is a universal principle of our law that a foreigner suing in the courts of this country must conform to the rules of the forum.

E. C. Clarkson, contrà. The statute was never meant to apply to a case where there was no property capable of being arrested; in the cross cause it was only meant to apply to a case where the property was in existence, but for some cause could not be arrested.

(1) See ante, p. 59.
(2) 3 W. Rob. 41, n.
(3) Lush. 79.
(4) 29 L. J. (P. M. & A.) 78.

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The 34th section of the Admiralty Court Act, 1861, applies only where both the cause and the cross cause are in rem, it has no application to a case like the present, where the cross cause is in personam: *The Duchesse de Brabant.* (1) The Court has no jurisdiction to entertain a suit in personam promoted by a foreigner resident out of the jurisdiction against a foreigner out of the jurisdiction: *The Johann Friederich.* (2)

[SIR ROBERT PHILLIMORE. The owners of the *Batavier* have appeared as plaintiffs, and are before the Court.]

They are before the Court, but in another suit.

Gibson, in reply.

SIR ROBERT PHILLIMORE. The Court ought not to be astute to find other than a liberal meaning for the section of a remedial statute; and I take a different view of the construction of the 34th section of the Admiralty Court Act, 1861 (24 Vic. c. 10) from that contended for by Mr. Clarkson. The Court has, I think, under the provisions of that section, power to stay the proceedings in the principal cause until such time as security to answer judgment shall have been given in the cross cause, and I am of opinion that it is equitable that such should be the rule. The owners of the *Batavier* have instituted the principal cause in this Court, and have obtained security for their claim, but in the cross cause they have refused to give any security for the claim of the defendant. The Court administers private international law and has jurisdiction in the present case, notwithstanding that the parties are foreigners. The section in question was expressly passed to remedy the former curtailed practice of the Court, and I am of opinion the defendant is entitled to the order he asks for. The security must be given within a week.

Solicitors for the owners of the *Batavier: Clarkson, Son, & Greenwell.*

Solicitors for the owner of the *Charkieh: McLeod & Watney.*

(1) Swa. 264. (2) 1 W. Rob. 35.

THE EUGÈNIE. (6491 and 6524.) 1873
Bottomree—Master's Wages—Marshalling of Assets. *July* 29.

The master of a French lugger executed bottomree bonds on ship, freight, and cargo, and bound himself personally by the bonds. The ship arrived at her port of destination, and the bonds were indorsed to the owners of the cargo who instituted a suit against ship, freight, and cargo, to enforce payment of the bonds. The master afterwards instituted a suit against the ship and freight for wages. The proceeds of the ship were insufficient to pay the bonds; but the proceeds of the ship, together with the freight and the value of the cargo, were sufficient to pay the bonds as well as the wages of the master:—

Held, that the master was entitled to have his wages paid out of the proceeds of the ship before any portion of that fund was appropriated to the payment of the amount due on the bonds.

THE *Eugènie*, a French lugger, in the course of a voyage from Lannion, in Britanny, to Bristol, was compelled to put into St. Malo in distress, having sustained damage in the prosecution of her voyage,; and expenses had to be incurred to enable the vessel to proceed on her voyage. Her master being without funds or credit at St. Malo, hypothecated the vessel, her freight, and cargo in order to obtain the necessary funds. Afterwards the vessel proceeded on her voyage and sustained further damage, and was obliged to put into the port of Milford for repairs; and the master, being without funds or credit at Milford, obtained a further loan on the security of a bottomree bond on the vessel, her cargo, and freight. The vessel then proceeded on her voyage and arrived in safety at Bristol. By each bond the master bound himself personally, and each bond provided for the payment of the amount of the bond, with maritime interest, on the safe arrival of the vessel at Bristol. The cargo was consigned to Messrs. Stoate, Hosegood, & Co. of Bristol, who were the legal owners thereof, and on the arrival of the vessel at Bristol they obtained possession of the bonds by indorsement.

Application having been made for the payment of the bonds, and the same remaining unpaid, on the 5th of May a cause was instituted on behalf of Messrs. Stoate, Hosegood, & Co. against the ship, cargo, and freight, to enforce payment of the bonds. The ship was arrested in this suit at Bristol, and on the 10th of June the judge pronounced for the validity of the bonds, and

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condemned the vessel in the amount due on the same, with interest and costs, and decreed the vessel to be sold at Bristol. On the 12th of June the master of the *Eugènie* instituted a cause of wages and disbursements against the vessel and freight in the sum of 250*l*. On the 21st of June, Stoate, Hosegood, & Co. appeared in this suit. On the 5th of July the proctor for Stoate, Hosegood, & Co. entered a caveat against the payment of any sum out of the proceeds of the sale of the vessel.

On the 10th of July the proctor for Stoate, Hosegood, & Co. admitted wages to have been earned by the plaintiff, and the judge directed that any question as to the payment of any amount that might be due to the master in respect of wages and disbursements should come before him on motion. It appeared that the proceeds of the ship were wholly insufficient to pay the bonds; but the proceeds of the ship, together with the freight and the value of the cargo, were sufficient to pay the bonds as well as the wages of the master. The proctors for Stoate, Hosegood, & Co. gave notice that they should move the judge to order the balance of the proceeds of sale of the vessel to be paid out to Stoate, Hosegood, & Co., in part satisfaction of the claim pronounced for on the 10th of June. The proctors for the master gave notice that they should move the judge to order payment to the master of the amount claimed by the master for wages out of the sum in the registry.

July 17. *Cohen* moved according to the terms of the notice of motion given on behalf of Stoate, Hosegood, & Co. The holders of the bottomree bonds are entitled to priority over the master, because he has bound himself by the bonds: *The Jonathan Goodhue* (1); *The William.* (2) The rule laid down in *The Edward Oliver* (3) does not apply to the present case, because here the holders of the bonds are the owners of the cargo, and the cargo has not been arrested, and bail has not been given for it; so the proceeds of the cargo are not before the Court.

E. C. Clarkson, moved in pursuance of the notice of motion given on behalf of the master, and opposed the motion on behalf

(1) Swa. 355. (2) Swa. 346. (3) Law Rep. 1 A. & E. 379.

of Stoate, Hosegood, & Co. *The Edward Oliver* (1) is exactly in point. The bonds are on ship, freight, and cargo, and the bottomree suit has been instituted against ship, freight, and cargo; and the holders of the bottomree bonds have the right to proceed, if they please, against the cargo. The circumstance that they are the owners of the cargo can make no difference in principle. The master has rendered himself personally liable only as an additional security for the bondholders, and this personal obligation of a master will not be enforced where the bondholder does not need to avail himself of it.

Cohen, in reply.

Cur. adv. vult.

July 29. SIR ROBERT PHILLIMORE. I have taken some time to consider this case, in which I have pronounced for the validity of the bottomree bonds. They are on the ship, cargo, and freight; the ship has been sold; the proceeds are insufficient to cover the bonds, the nett proceeds being 76*l.* 16*s.* 5*d.* The bonds are for 236*l.* The master has instituted a suit for wages for 250*l*; the master has signed both the bonds, and made himself personally liable for them. Nevertheless, under the authority of the decision in *The Edward Oliver* (1), as the proceeds of the ship and cargo would be sufficient to pay both his wages and the bonds, the Court might so marshal the assets as to do justice to both parties. In *The Edward Oliver* (1) the Court said, p. 383:—

"This is the first time the point has been raised. The general principle is clear. If a master by the terms of a bottomry bond has bound himself, as well as ship and freight, for the payment of the bond, it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of the ship and freight payment of his own claims against the owners, leaving the bottomry bondholders unpaid. Hence the rule by which the master's claim is liable under those circumstances to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of cargo should be benefited at the expense of the master, for the master, though he may have bound himself for the payment of the bond to the holder thereof, has made no such contract with the owners of cargo, and they are not entitled

(1) Law Rep. 1 A. & E. 379.

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to invoke a rule made only for the protection of the bondholder. The Court will, therefore, pronounce the proceeds of the ship and freight to be first applied in payment of the master's claim for wages and disbursements."

In the case before me the owners of the cargo have bought up the bonds, apparently with a view of taking this case out of the application of the rule in *The Edward Oliver*. (1) Moreover, it is urged that in *The Edward Oliver* (1) the owners of the cargo had given bail, which they had not done in this case. This does not appear to me to affect the principle on which I must decide. It is said that it is hard the owners of the cargo should pay the wages of the master, who may recover at common law against the shipowner. But I am unable to distinguish this case from *The Edward Oliver* (1), and, as far as general equity is concerned, I think it is in favour of the master's claim. The cargo owner may recover against the shipowner: *Benson* v. *Duncan* (2); and it is by the skill and exertion of the master that the ship has been safely navigated and the cargo brought to its destination. The bonds are somewhat unusually worded, but this circumstance does not affect the principle applicable to the case. The money is not raised for the benefit of the master, but of the ship, freight, and cargo; they are the principals, he the surety. I do not see why the circumstance that the owner of the cargo had purchased the bonds should put him in a better condition than any other purchaser. I shall follow *The Edward Oliver* (1), and decree as prayed by the master.

Solicitors for the bondholders, plaintiffs in cause 6491: *Fielder & Sumner.*

Solicitors for the master of the *Eugènie*, plaintiff in cause 6524: *Clarkson, Son, & Greenwell.*

(1) Law Rep. 1 A. & E. 379. (2) 3 Ex. 644; 18 L. J. (Ex.) 169.

THE RASCHE. (L. 77.)

1873
March 28.

Salvage—Derelict.

A ship on a voyage from Melbourne to London fell in with a derelict brigantine 220 miles to the westward of the *Lizard*, in the month of February, and put an officer and three hands on board her, who, under circumstances of great difficulty and danger, and after much hardship, brought her in safety to Liverpool. In a salvage suit instituted on behalf of the owners, master, and crew of the ship, the Court, after directing expenses incurred by the salvors to be paid to them out of the proceeds of the salved property, awarded more than a moiety of the residue as salvage reward.

5 P.D. 190
8 P.D. 31

THIS was a salvage suit instituted on behalf of the owners, master, and crew of the ship *Scythia*, against the brigantine *Rasche*, her cargo and freight. The facts, which were admitted upon the pleadings, appear from the judgment.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *W. G. F. Phillimore*, for the defendants.

SIR ROBERT PHILLIMORE. In this salvage suit the facts are undisputed, and, in the judgment of the Court, an undoubted service of extraordinary merit has been performed.

Indeed there is only one circumstance which, as far as questions of humanity are concerned, would have heightened it, and that is that there is no claim for life salvage. But with the exception that no life was saved, as the vessel salved was abandoned by her master and crew, all the essential ingredients of a very high salvage service were present.

Now, the *Scythia* is an iron ship of 836 tons register, and at the time the services were rendered she was manned by a crew of twenty-three hands all told, and was of the value of 16,000*l.*, and she had on board a cargo of the value of 112,000*l.* The *Rasche*, the vessel salved, is a brigantine of about 250 tons register, whose value has been agreed at 1880*l.*, and the value of her cargo at 4814*l.*, making a total value of 6694*l.*

Before the *Scythia*, this vessel with such great interests on board her, fell in with the *Rasche*, she passed a brig which had attempted

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to render service to the *Rasche*, but could not put a man on board her. The captain of the *Scythia*, on coming up with the *Rasche*, sent the mate on board her, who, on finding that she was abandoned by her crew, left one man, who with great gallantry remained on board, and the mate, returning to his vessel, represented to the captain that if the captain approved he would take charge of her if he could get volunteers to assist. The captain, though taking on himself great responsibility, chose out of the crew of the *Scythia*, who had all volunteered, three men; and the mate, taking two of them with him, was put on board the *Rasche;* the third man being already on the *Rasche*, having been left on board that vessel whilst the mate had returned to consult with the captain. The three men and the mate for eighteen days navigated the *Rasche*, in circumstances of very great danger, and succeeded in saving her from a total loss. That the *Rasche* was nearly totally lost is, I think, proved by the fact that the captain, when he first sent the mate on board her, thought it would be necessary to scuttle her if he could not save her.

I may mention that the place where the *Rasche* was fallen in with was about 220 miles to the westward of the Lizard; and that the *Scythia* was on a voyage from Melbourne to London. The fare of the men whilst on board the *Rasche* was miserable; they had very bad food, all the stores on board being more or less damaged, and for the first two or three days they lived almost entirely on biscuits. They had between themselves to arrange watches for the eighteen days they were alone on board the *Rasche*. And it must be remembered that the *Scythia* having parted with the men sent on board the *Rasche* was left shorthanded; and that the time she took to complete the passage to London was three times as long as the time usually taken by her—three times as long as the time she otherwise would have taken.

Now the value of the property saved by the gallantry of the salvors has been valued, as before-mentioned, at 6694*l.*, and from this amount the sum of 600*l.* 18*s.* 2*d.* for the expenses incurred by the owners of the *Scythia* will have to be deducted.

That would leave me to deal with the net sum of 6294*l.* In the circumstances of extraordinary merit and gallantry under which the services were rendered, I shall award as salvage the sum of

3290*l.*; of this sum I shall award to the mate 600*l.*; to the three men who went on board the *Rasche* 510*l.* each; to the rest of the crew and officers of the *Scythia* 360*l.*; and 500*l.* to the owners. 1873 THE RASCHE.

The sum of 360*l.* to be divided among the officers and crew according to their rating, the shares of the runners and apprentices being calculated as if they were able seamen.

Solicitors for plaintiffs: *Bateson & Co.*
Solicitors for defendants: *Duncan, Hill, & Parkinson.*

THE MELPOMENE. (L. 64, 67.)

March 28.

Salvage—Practice—Consolidation of Causes.

Salvage suits may be consolidated on the motion of the plaintiffs and without the consent of the defendants.

A steam-tug attempting to render assistance to a ship exhibiting signals of distress may, in a case where such ship is afterwards salved by means of other assistance, be entitled to salvage reward, even though her efforts have been practically unavailing. (1)

A CAUSE of salvage was instituted in the Liverpool District Registry against the ship *Melpomene*, her cargo and freight, on behalf of the owners, master, and crew of the steam-tug *Fiery Cross*.

Another cause of salvage was afterwards instituted in the same registry against the same ship, her cargo and freight, on behalf of the owners, master, and crew of the steam-tug *Resolute*. Both tugs belonged to the New Steam-tug Company, Limited, and at the time of the institution of the first cause the company's officers were not aware that salvage services had been rendered by the *Resolute*. Afterwards the district registrar, on the application of the plaintiffs, made an order consolidating the two causes.

Jan. 21. *E. C. Clarkson*, on behalf of the defendants, moved to set aside the consolidation order. It is a common practice to consolidate salvage causes on the motion of the defendants,

(1) See the Merchant Shipping Act Amendment Act, 1873 (36 & 37 Vict. c. 85), s. 18.

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but it is contrary to the established practice of the Court to do so on the motion of the plaintiffs. The only object of the plaintiffs is to prefer a duplicate claim in the cause of the *Resolute* without incurring the risk of costs.

Butt, Q.C., contrà. The Court will not enter into the merits of the claim now. No practical difficulty can arise as to the costs in any case, because the Court has full power over them.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. This is an application to the Court to reverse an order of the registrar of the Liverpool District. The order is, that these causes of salvage should be consolidated. It is the recognised practice of the Court to recognise and enforce the consolidation of salvage causes. It is quite true, as stated by Mr. Clarkson, that applications for consolidation are usually made on the part of defendants, whilst in the present case the application is on behalf of the plaintiffs. I consider, however, it is a reasonable application, from whatever motive it may be induced, as it has for its effect to secure the defendants from the payment of the larger costs that might be incurred if both suits were prosecuted separately. It is stated as a reason for reversing the order that the second suit is a trumpery suit, and costs would be so increased therein that the defendants will have no remedy. But I am informed by the registrar that there is no difficulty in apportioning costs in such a suit, and in making the second set of salvors pay the costs incurred in respect of their suit if it should be necessary. Moreover, it is competent to the Court to sever the claims and award a sum nomine expensarum if there is any difficulty. I shall, therefore, allow the consolidation and affirm the order of the district registrar.

On the 28th of March the consolidated cause came on for hearing. The defendants had tendered by act in court 120*l.* in respect of the services of the *Fiery Cross*, and the tender had been rejected. It appeared from the pleadings and the evidence, that about 3 a.m. on the 9th of December, 1872, the *Resolute* was lying under steam in the Mersey, when she saw the *Melpomene* in collision with a screw-steamer, and drifting up the river at a rapid rate with the

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flood tide. The *Resolute* immediately followed them for the purpose of rendering assistance, and attempted to get a hawser on board the *Melpomene*, but without success. The *Melpomene* then drifted further up the river, and exhibited blue lights as signals for assistance, when the *Resolute* made another attempt to take her in tow, and a hawser was passed between the two vessels; the *Resolute* then steamed ahead, but shortly afterwards it was discovered that the hawser came away, and that it had not been made fast on board the *Melpomene*. The *Fiery Cross* subsequently came up, and by her assistance and that of other tugs, the *Melpomene* was taken to a place of safety.

Butt, Q.C., and *Cohen*, appeared for the plaintiffs.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. They contended that no services in the nature of salvage services had been rendered by the *Resolute*. Success is an essential element in salvage service. The very principle which actuates the Court in liberally rewarding successful services is that, in many cases, meritorious efforts are unrewarded because unsuccessful: *The Edward Hawkins*. (1)

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE awarded as remuneration for the services rendered by the *Fiery Cross* and her crew 30*l*. in addition to the sum tendered. He proceeded to say: With regard to the question whether the *Resolute* is entitled to any remuneration at all, I have had considerable difficulty, seeing that her intention, however good, was, according to the evidence, practically unexecuted; but, on the other hand, I think there are no cases which would stand in the way of my adopting as a principle this proposition, which appears to me of considerable importance to the interests of commerce and navigation, especially at the present time, namely, that where a vessel makes a signal of distress and another goes out with the bonâ fide intention of assisting that distress, and, as far as she can, does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded. I think it is for the interests of commerce

(1) 15 Moo. P. C. 486.

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and of navigation, and also for the encouragement of salvage services generally that some remuneration should be given. I think a slight remuneration will suffice on the present occasion, and I shall award the *Resolute* 50*l.*

Solicitors for plaintiffs: *Simpson & North.*

Solicitors for defendants: *Hull, Stone, & Fletcher.*

May 15.

THE BENMORE. (6455.)

Damage—Inevitable Accident—Onus of Proof.

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In a cause of damage the defendants, by their pleading, made no charge of negligence against the plaintiffs, but denied generally the averments in the petition, and pleaded inevitable accident:—

Held, that the plaintiffs ought to begin.

The Thomas Lea (38 L. J. (Ad.) 37) overruled.

THIS was a damage suit instituted on behalf of the owners of the late ship *Sree Singapura*, and on behalf of the owners of the cargo of the said vessel, and also on behalf of her master and crew, against the ship *Benmore*. The petition stated in substance as follows:—

1. At about 6.30 p.m. of the 29th of March, 1873, the *Sree Singapura*, in the prosecution of her said voyage, was in the English Channel, about twenty miles N.E. of the Caskets. The weather was foggy and the *Sree Singapura* was proceeding under sail, close hauled on the starboard tack, heading N.E. by N., and making from three to four knots an hour, with the Admiralty regulation lamps duly exhibited and burning well and brightly, and a fog-horn was being duly sounded, and a good look-out was being kept from on board her.

2. While the *Sree Singapura* was thus proceeding the sound of the fog-horn of a vessel was heard by those on board her, and shortly afterwards a vessel (which proved to be the *Benmore*) was seen at the distance of between three and four cables' lengths, and bearing about two and a half points on her port bow. The *Benmore* was proceeding on the opposite, the port tack, and the *Sree Singapura* was kept on her then course, close hauled to the wind, on the starboard tack, in the expectation that the *Benmore* would

keep out of her way, as she was bound and ought to have done. The *Benmore*, instead, however, of so doing, approached, and although loudly hailed from the *Sree Singapura*, ran into and struck her upon the port side, between the main and mizen rigging.

3. The *Benmore* improperly neglected to keep out of the way of the *Sree Singapura*.

4. The helm of the *Benmore* was improperly ported.

5. The proper regulation lights were not duly exhibited on board the *Benmore*.

6. Those on board the *Benmore* neglected to keep a good look-out.

7. The said collision and the losses of the plaintiffs consequent thereupon were occasioned by the negligent and improper navigation of the *Benmore*.

8. The said collision was not in any way occasioned by any negligence on the part of those on board the *Sree Singapura*.

The answer filed on behalf of the defendants, the owners of the *Benmore*, contained the following allegations:—

1. Shortly after 6 p.m. on the 29th of March, 1873, the *Benmore* was in the English Channel, about twenty-five miles to the N.E. of the Caskets.

2. There was a thick fog, but it was still daylight. The *Benmore* was sailing close-hauled by the wind on the port tack, at the rate of about from three to four knots per hour. The fog-horn of the *Benmore* was being sounded at short intervals, and a good look-out was being kept on board her.

3. At such time the fog-horn of a vessel, which proved to be the *Sree Singapura*, was heard apparently ahead, or a little on the starboard bow of the *Benmore*. The helm of the *Benmore* was put hard aport, but there was not quite sufficient time for her to pay off enough to clear the *Sree Singapura*, and the *Benmore* came into collision with the starboard side of the *Sree Singapura*.

4. Save as herein appears, the defendants deny the truth of the several allegations contained in the 2nd, 3rd, and 7th articles of the petition filed in this cause.

5. The helm of the *Benmore* was not improperly ported, as alleged in the 5th article of the said petition.

6. As to the 6th article of the said petition, the defendants say that at the time of the said collision it was still daylight, that the

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THE BENMORE.

lights of the *Benmore* were about to be exhibited, and that the absence of the lights of the *Benmore* did not in any way cause or contribute to the collision.

7. As to the 4th and 8th articles of the said petition, the defendants say that the said collision was not caused by any negligent or improper navigation of the *Benmore*, but was, so far as the *Benmore* was concerned, the result of inevitable accident.

The answer did not charge the plaintiffs with negligence.

May 15. The case came on for hearing.

G. Bruce and *Gibson*, for the plaintiffs, contended that the onus of proof was upon the defendants, and that they should begin. It appears from the pleadings that the *Sree Singapura* was on the starboard tack, and the *Benmore* was on the port tack; and therefore the *Benmore* was bound to keep out of the way of the *Sree Singapura*. It is therefore incumbent upon the *Benmore* to excuse herself for not getting out of the way. No charge of negligence is made against the *Sree Singapura*, and the only defence raised is that of inevitable accident; and it must rest with the *Benmore* to establish the defence: *The Bolina* (1); *The Thomas Lea*. (2)

Butt, Q.C., and *E. C. Clarkson*, for the defendants, contended that the onus of proof rested with the plaintiffs. The plaintiffs must establish that there was negligence on the part of the *Benmore*. The material allegations in the petition are denied, and the plaintiffs must prove them: *The Marpesia*. (3)

SIR ROBERT PHILLIMORE. It is true that the practice of the Court has been to call upon the defendants to begin in cases where no charge of negligence is made against the plaintiff, and the only defence raised on the pleadings is inevitable accident; but I think, after the recent decision of the Judicial Committee of the Privy Council in the case of *The Marpesia* (3), I can no longer allow this practice to prevail. I rule that the plaintiffs must begin.

Solicitor for plaintiffs: *Cooper*.

Proctors for defendants: *Pritchard & Sons*.

(1) 3 No. of Ca. 208. (2) 38 L. J. (Ad.) 37.

(3) Law Rep. 4 P. C. 212.

[IN THE ARCHES COURT OF CANTERBURY.]
[APPEAL FROM THE COMMISSARY COURT OF CANTERBURY.]

1873
Nov. 14.

FAGG AND ANOTHER *v.* LEE.

Monition in Civil Suit—Allegation of Interest.

A monition calling upon the churchwardens of a parish to remove certain alleged unlawful ornaments in the parish church, or to appear and shew cause against such removal, must disclose on its face such an interest in the person at whose instance it issued as would have entitled him to institute and carry on a civil suit commenced in the ordinary way by citation, and must, therefore, contain an allegation that the party taking proceedings has the status of a parishioner of the parish.

Liddell v. *Beal* (14 Moore P. C. 1), followed.

By this case the proceedings were promoted by John Benjamin Lee, of 2, Broad Sanctuary, in the city of Westminster, and were in the nature of a cause or business of monishing the Rev. Charles Joseph Ridsdale, clerk, the incumbent, and John Fagg and Edward Mummery, the churchwardens of the parish or district and church of St. Peter's, Folkestone, in the county of Kent and diocese of Canterbury, to remove certain representations of figures representing scenes of our Lord's passion, and ornaments called stations of the cross and passion, which were alleged to have been attached to the walls of that church since its consecration and without the authority of a faculty, or to appear and shew cause why an order to remove the same should not issue. (1)

(1) The monition was to the following effect:—"Archibald Campbell, by Divine Providence Lord Archbishop of Canterbury, Primate of All England, and Metropolitan, to all Christian people to whom these presents shall come, whom they shall or may in anywise or at any time concern, and more especially to the Reverend Charles Joseph Ridsdale, clerk, the incumbent, and John Fagg and Edward Mummery, the churchwardens, of the parish or district and church of St. Peter, Folkestone, in the county of Kent, within our diocese and jurisdiction of Canterbury: Whereas it has been alleged by John Benjamin Lee, of No. 2, Broad Sanctuary, in the city of Westminster, before the Worshipful Thomas Hutchinson Tristram, commissary general of the diocese and city of Canterbury, and Judge of our Consistorial and Commissary Court of Canterbury, lawfully constituted, that there are within the church of St. Peter, Folkestone, in the county of Kent and diocese of Canterbury, and within our jurisdiction, certain representations of figures, in coloured

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On the 26th day of May, 1873, the case came on before the Worshipful *Dr. Tristram*, Commissary General of the diocese of Canterbury. (1)

A. J. Stephens, Q.C., and *W. G. F. Phillimore*, on behalf of the

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relief, of plastic material, representing scenes of our Lord's passion, attached to the walls of the said church, and commonly called stations of the cross and passion such as are commonly used in Roman Catholic churches, and not in churches of the Church of England: And whereas it has also been alleged that the said representations of figures or stations have been introduced into the said church of St. Peter since the consecration thereof, and without the authority of any faculty; and also that the use and exhibitions of the said representations of figures or stations is contrary to the laws, canons, constitutions, and customs of the Church of England: and whereas the said Worshipful T. H. Tristram, rightly and duly proceeding, hath, at the petition of the said J. B. Lee, decreed the said Rev. C. J. Ridsdale, the incumbent, and J. Fagg and E. Mummery, the churchwardens aforesaid, to be monished and cited in manner and form, and to the effect and purpose hereinafter mentioned, justice so requiring: we do, therefore, hereby authorize, empower, and strictly enjoin and command you that you do peremptorily monish and cite the said Rev. C. J. Ridsdale, clerk, incumbent of St. Peter aforesaid, and the said J. Fagg and E. Mummery, the churchwardens aforesaid, by shewing to each of them this original monition under seal, and by leaving with each of them a true copy hereof, that they do forthwith and without delay remove, or cause to be removed, the said representation of figures in coloured relief, of plastic material, representing scenes of our Lord's passion, commonly called stations; or that, should they, or either of them, have or know any good or sufficient cause to the contrary, that they do, within eight days from the date hereof, enter an appearance in the registry of our Consistorial and Episcopal Court of Canterbury, and do hereafter lawfully appear before our commissary general aforesaid, his surrogate, or some other competent judge in this behalf, in the said Consistorial and Episcopal Court of Canterbury, on such day and at such hour as shall be named, of which due notice shall be given to the parties or party so entering an appearance, then and there to shew good or sufficient cause if they or any or either of them have, or know any cause why the said representations of figures, commonly called stations, should not be removed as aforesaid, and further, to do and receive, as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said J. B. Lee, and what you shall duly certify to our commissary general aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at Canterbury this 24th day of March, in the year of our Lord 1873, and in the fifth year of our translation."

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(1) The Court was held within the precincts of Lambeth Palace.

churchwardens (1), prayed that they might be dismissed from the suit with costs, on the ground that the monition did not shew on its face that the promoter had any interest, either of a public or private character, in the matter complained of, and that if any offence had been committed the parties cited should have been proceeded against by articles in a criminal suit, and not by way of monition. The monition had issued on the promotion of John Benjamin Lee, described therein as of 2, Broad Sanctuary, in the city of Westminster, and contained statements to the effect that it had been alleged by the promoter that the representations of figures so ordered to be removed were such as were commonly used in Roman Catholic churches, and not in churches or chapels of the Church of England, and that the use and exhibition of the said representations of figures or stations was contrary to the laws, canons, constitutions, and customs of the Church of England, but did not further set forth the nature of the interest of the promoter in the matter complained of.

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The following case was cited in addition to those referred to in the judgment: *Reg* v. *Bishop of Chichester*. (2)

The learned Commissary General, after taking time to consider, delivered the following judgment:—

June 10. DR. TRISTRAM. In this case a monition issued out of the court, dated the 24th day of March, 1873, at the petition of Mr. John Benjamin Lee, described therein as of No. 2, Broad Sanctuary, in the city of Westminster, which after reciting that it had been alleged by Mr. Lee that there were attached to the walls of St. Peter's Church, Folkestone, in the diocese of Canterbury, certain representations of stations of the cross and passion of our Lord, such as are commonly used in Roman Catholic churches, but not in churches of the Church of England; that such stations had been introduced into the church since its consecration, and without the authority of a faculty; and that their use and exhibition was contrary to the law of the church, monished the Rev. Charles Joseph Ridsdale, the incumbent of the parish, and Mr. John Fagg and Mr. Edward Mummery, the

(1) No counsel appeared for the incumbent of St. Peter's, Folkestone.

(2) 2 E. & E. 209; 29 L. J. (Q. B.) 23.

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churchwardens, to remove such stations without delay or to appear and shew cause in this court why an order should not issue for their removal. The monition was served on the incumbent and churchwardens on the 25th of March, and on the 31st of March Messrs. Brooks, Tanner, & Jenkins entered an appearance as their proctors. A few days afterwards I received an intimation that the incumbent was not prepared to shew cause against the monition, and that the stations would be removed without further action on the part of the Court. But during the last month, it having been represented to me, on the part of Mr. Lee, that they had not been removed, I directed notice to be given to the parties cited that I should hold a Court on the 26th day of May to make an order in the matter. (1) On the case being called on the incumbent did not appear, either by counsel or proctor, but Mr. Stephens and Mr. Phillimore appeared as counsel for the churchwardens, and prayed the Court to dismiss them from the suit with costs on the ground that Mr. Lee did not shew on the face of the monition any interest in the matter complained of, either of a public or a private character, and they cited several cases as authorities in support of their application.

It was admitted in argument, that it was not necessary for the promoter of a criminal suit to shew that he had any special interest in instituting it: see the *Duke of Portland* v. *Bingham* (2) and other cases. But it was contended, that it is essential to the validity of a citation in a civil suit, that it should appear on the face of it that the party, at whose instance it was issued, has an interest in bringing the suit; and it was further contended, that the present proceeding by monition was in fact a civil suit, or so analogous to a civil suit that the same rule as to interest would apply to it.

The first proposition in most cases may, in a certain sense, be not without some foundation. Every citation in a suit to assert or protect the plaintiff's rights will necessarily shew that the party complaining has some apparent grievance against the party com-

(1) This notice was contained in a letter to the defendants from the registrar of the Commissary Court of Canterbury. The letter is set out in the judgment of the learned Dean of the Arches (infra, p. 151).

(2) 1 Hagg. Const. 157.

plained of, for which he seeks redress. But in some civil suits one material question, and in others the sole question, for decision may be, whether the party complaining has any interest in the matter complained of, such as to entitle him to redress. The determination of the question of his interest will depend upon questions of mixed law and fact, and it is surely the province of pleadings, and not of the citation, to indicate the facts on which the plaintiff relies in support of his interest.

A rule requiring the plaintiff in every civil suit to allege on the citation the various facts he relies upon in support of his interest would be attended with much practical inconvenience. It is nowhere laid down in our books of practice, or in any of the cases cited by counsel, that it is essential to the validity of a citation in a civil suit, that it should set forth the nature of a plaintiff's interest in the suit.

In vol. 3, Burns' Ecclesiastical Law, by Phillimore, p. 245, the requisites for a citation in a civil suit are given as in the terms stated by Conset in his Eccl. Practice, p. 26, ed. 1708, viz. that it should contain:—1. The name of the judge, his commission, and the style of the court. 2. The name of the party cited. 3. The day and place where he must appear. 4. The cause for which the suit is to be commenced. 5. The name and address of the party at whose instance the citation is obtained. (1) 6. The residence and diocese of the defendant, to shew that he is not cited out of his diocese.

It is to be observed that the plaintiff's name and address only, and not his interest, is required to appear in the citation. Nor do the cases cited on examination support the first proposition.

The case of *Hopper* v. *Davis and Others* (2) was a civil suit instituted not by the incumbent, but by the chapelwardens of Barnard Castle against Mr. Hopper, for the purpose of obtaining the removal of a monument which had been erected in a corner of the church fourteen years previously, but, as they alleged, without lawful authority.

It would appear that objection was taken to their interest as

(1) In the 2nd vol. of Phillimore's Ecclesiastical Law, ed. 1873, the fifth requisite of a citation is said to be "The name of the party at whose instance the citation is obtained."

(2) 1 Lee Eccl. 640.

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chapelwardens to bring the suit, but the Judge of the Court of Durham did not dismiss the chapelwardens from it, on the ground that they did not shew on the citation an interest in the suit, but directed them to propound their interest, which they did, alleging as their interest that the monument was an inconvenience to the church, and that the place where it stood was wanted by the parish for standing room for a fire-engine. The allegation of inconvenience was denied by Mr. Hopper, who also alleged that it had been set up with the consent of the minister, and subsequently confirmed by faculty, and the sentence of the Judge of the Court of Durham dismissing Mr. Hopper from the suit was ultimately affirmed by the High Court of Delegates.

In the case of the *Duke of Portland* v. *Bingham* (1), the matter of complaint on the citation was, that Dr. Bingham was officiating under a licence from the Bishop of London, in Quebec Chapel, situate in the parish of St. Marylebone, to the injury of the duke as lay-rector and lay-impropriator of the parish, and it was sought by a civil suit to have the bishop's licence revoked. Upon the face of the citation (and I have inspected the original one in the registry of the Consistory Court of London) it is difficult to conceive how the matter complained of could constitute a grievance to the duke, but Dr. Bingham, instead of moving the Court summarily to dismiss him from the suit, appeared under protest, and raised the question of the Duke's interest by act on petition, and so gave the duke an opportunity of bringing by plea before the Court the facts upon which he might rely in support of his interest. In *Ray* v. *Sherwood* (2) the great question was, whether the plaintiff had sufficient interest to support a civil suit, a point which was raised not by objecting to the sufficiency of the citation, but to the admissibility of the libel. The cases of *Williams* v. *Bott* (3) and *Steward* v. *Bateman* (4), were also cited, but as the objections there taken were to the insufficiency of the decrees to support a criminal charge, I do not think they have a material bearing on this part of the case.

I have come to the conclusion that, although to sustain a civil suit the plaintiff should shew an interest in it, yet that the only

(1) 1 Hagg. Const. Rep. 157.
(2) 1 Curt. 173.
(3) 1 Hagg. Const. Rep. 1.
(4) 3 Curt. 201.

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convenient and the correct mode of raising an objection to his interest is by the defendant either appearing under protest or praying the Court to order the plaintiff to propound his interest, or raising it on the admission of the libel, or by plea, or on the subsequent pleadings. I think that the objection to Mr. Lee's interest, if taken at the early stages of the proceedings, should have been by an appearance under protest, or the defendants' having appeared (see *Prankard* v. *Deacle* (1)) by then calling on the plaintiff to propound his interest.

I will now proceed to consider the second proposition contended for, viz., "That the proceeding by monition in the present case is in fact a civil suit, or so analogous to one, that the rule which obtains in civil suits, requiring the plaintiffs to shew an interest, is applicable to it."

This leads to the inquiry, "what is a monition" where issued otherwise than for the purpose of enforcing obedience to an order of Court? I think it may be defined to be "a summary proceeding by which an ecclesiastical court may restrain a person from doing or proceeding with an act injurious to private rights, or may restrain the threatened or continued violation of public law, or may compel the performance of any act which it may be the duty of those within its jurisdiction to do."

There is very little to be gathered, so far as my research has gone, with regard to original proceedings by monition either in the books or in the cases. (But see Dr. Waddilove's Ecclesiastical Digest, 248; *Viscount Maynard* v. *Brand* (2); *Millar & Another* v. *Palmer & Another* (3); *Sieveking & Evans* v. *Kingford.* (4)

It is of importance to observe the distinction between the mode of the inception of a civil suit by citation and of the inception of a proceeding by monition; as well as the difference in the forms of the two processes. A citation from the time of Oughton in Doctor's Commons was prepared by the plaintiff's proctor, and issued (except in faculty cases) as a matter of right, without the leave of the judge. But where proceedings are commenced by monition, the monition has never been allowed to issue, except with the leave of the judge obtained upon an ex parte application

(1) 1 Hagg. Eccl. 169, 185.
(2) 3 Phillim. 501.
(3) 1 Curt. 540.
(4) 36 L. J. (Eccl.) 1.

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made to him on behalf of the party applying for it, and on his being satisfied that it was a proper case in which to issue a monition.

Such is the practice of the Consistory Court of London, and this practice was strictly adhered to in the present case.

On the 22nd of February, an ex parte application was made to me in the presence of my registrar (and also of Messrs. Brooks & Co.'s clerk) on the part of Mr. Lee, for the Archbishop of Canterbury to issue a monition out of this Court against the incumbent and churchwardens of St. Peter's, Folkestone, for the purpose of enforcing the removal of the stations in question. It was stated that it was proposed to discontinue certain proceedings under a monition issued by his grace the archbishop, against the incumbent and churchwardens to effect the same object, and which had been referred to me by his grace, as the incumbent objected to his grace's jurisdiction to enforce such monition. I then stated that I should not order a monition to issue from the Court until a notice was filed in the registry of the discontinuance of the proceedings under the archbishop's monition, and until certificates had also been filed of the service of such notice on the incumbent and churchwardens, as otherwise it might be suggested that they were being harassed by two suits in respect of the same matter at the same time. Upon this notice and certificate being filed, together with an affidavit of the Rev. Canon Puckle, the rural dean of the deanery within which Folkestone is situated, of facts to lead to the monition, I ordered a monition to issue upon Mr. Lee's petition, being satisfied that it was a proper case in which to issue a monition, that the application was made by Mr. Lee with the sanction of the Archbishop of Canterbury, and that Mr. Lee was a proper person to have the conduct of the proceeding.

There is a material distinction between the form of this monition and the form of a citation in an ordinary civil suit. This monition does not allege that the incumbent and churchwardens have been personally guilty of any infringement of private rights, or even of any violation of public law, but it is, in the first place, an order made upon them by this Court (after I had visited the church and seen the stations) to remove certain ornaments of a most unprecedented character, which had been proved to my satisfaction to

have been affixed to the walls of the church since its consecration without the authority of a faculty, and consequently in contravention of the law, and intimating to them that if they do not comply with this order, they may appear and shew cause why an order for their removal should not issue.

It was argued that on the authority of *Liddell* v. *Beal* (1), such a monition as this could only issue at the instance of a party shewing an interest. The question raised in the last stage of that case was, whether an order made by the Judicial Committee for the removal of certain ornaments from the church of St. Barnabas, Pimlico, and which were in the church at the time of its consecration, and were therefore there under the authority of the act of consecration, had been complied with. Mr. Beal alleged that it had not, and Mr. Liddell and the churchwardens that it had. The present Dean of the Arches and myself, who were counsel for Mr. Liddell and the churchwardens, took a preliminary objection to Mr. Beal being heard, on the ground that the monition initiating the proceedings had been applied for and obtained from the Consistory Court of London, by Mr. Beal in his character of a parishioner of St. Barnabas, that the order for the removal of the ornaments had been obtained by him in the same character, and that (I recollect the line of argument which was addressed to the Court, and which was well considered) he having now lost this status, we submitted for the consideration of the Court, whether, in analogy to the rule in civil suits which required a plaintiff to shew an interest, he was in a position to harass Mr. Liddell and the churchwardens with that application, which was made apparently without the sanction of the parishioners, and was, as we should contend, vexatious. The argument is not so fully given in the report, but the objection was waived by us, and the Court then made certain observations which are thus reported:—"Their Lordships intimated their opinion that the objection in general law and practice was correct, and that it was only in the particular circumstances of the case, and having regard to the waiver of the objection by the incumbent and churchwardens, that Mr. Beal should be allowed to proceed, but that the permission granted to him was not to be considered as a precedent."

(1) 14 Moo. P. C. C. 1, 12.

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Their Lordships made these observations without hearing Mr. Beal on the objection, or actually deciding whether he had or had not a locus standi, and these words cannot fairly be construed as deciding that the Chancellor of a diocese is to be precluded from issuing a monition to restrain the violation of the public law in a church within his jurisdiction in a case such as the present, in which certain ornaments have been affixed to the walls of the church since its consecration, without the authority of the faculty, unless a parishioner or some one connected with the parish undertakes the carriage of the proceedings.

The object of the monition in this case is to enforce obedience to the law; and according to Lord Stowell, in the *Duke of Portland* v. *Bingham* (1), every one has an interest in preserving public order, and is entitled to institute proceedings for that purpose; and the monition, therefore, on the face of it (if the doctrine of interest applies to a case such as the present, and I do not think it does), shews that Mr. Lee has an interest. It was contended also, that if Mr. Lee did not shew an interest of a private character, he should shew one of an official character on the monition. There are objections to a bishop being a party to a suit in his own court. The Statute of Citations, 23 Hen. 3, c. 9, contemplates this; for it provides that when the bishop of a diocese is a party to a suit, any party to such suit, although resident in the diocese, may be cited out of it, and exception might be taken to Mr. Lee appearing on the record as promoting the suit officially, as secretary to the archbishop in his Grace's diocesan court. It was further suggested that, as the monition in terms indicates that an ecclesiastical offence has been committed by the introduction of the stations, proceedings should have been taken in a criminal and not in a civil form; and the observations of Lord Stowell in the case of the *Duke of Portland* v. *Bingham* (1) were referred to in support of this proposition. But to sustain articles in such a case, a promoter must prove that the party or parties proceeded against were concerned in the illegal introduction of the ornaments. It is not alleged on the monition that they were introduced by the churchwardens, or even by Mr. Ridsdale. It being admitted that Mr. Lee would have sufficient interest to obtain an order for their re-

(1) 1 Hagg. Const. 157.

moval in a criminal suit—if the party who put them up were alive and within the jurisdiction of the court, and he were able to convict him of the offence in such a suit—surely he must have sufficient interest to obtain an order for their removal by a proceeding by monition.

There are, I am aware, observations in several of the cases to the effect that, where a criminal offence has been committed, proceedings should be by articles, and not in a civil form. But in these cases the question raised was whether they should be by articles or by a civil suit in the ordinary form, and not whether they should be by articles or by monition. In the case of *Sieveking & Evans* v. *Kingsford* (1) Sir Travers Twiss, as Chancellor of London, was of opinion that, under the circumstances, it was a proper case for proceedings to be taken under the Church Discipline Act, and it was therefore sent by letters of request to the Court of Arches. At the close of the case, on Dr. Deane asking Dr. Lushington for his opinion whether the proceedings in that particular case might not have been by monition, he declined to give an opinion without hearing the question argued. The facts in *Westerton* v. *Liddell* (2) and *Beal* v. *Liddell* (3) shew that some of the matters complained of in those suits might have been the subject of proceedings in a criminal form by articles; but Dr. Lushington, on application made to him, allowed the proceedings in respect of all the matters complained of to be, in the first of these cases, in the form of an application for a faculty to remove the ornaments objected to, and in the second by monition.

The course sanctioned on that occasion is an authority for resorting to proceedings by monition, for the purpose of effecting the removal of ornaments. Certain passages from a learned work on ecclesiastical law, recently published, and for which the profession is deeply indebted to the present Dean of the Arches, were cited. I have referred to them and to other parts of that work which I thought might have a bearing on the present question, and I have the satisfaction of stating that I do not find in it any passage at variance with my decision in this case.

Having come to the conclusion that the propositions contended

(1) 36 L. J. (Eccl.) 1. (2) Moo. Spec. Rep. 1857.
(3) Moo. Spec. Rep. 1857.

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for by the counsel for the churchwardens have not been established; it is my duty to reject this application, which is that the churchwardens should be dismissed from the suit with costs.

An appeal against the sentence of the Commissary General of the diocese of Canterbury was prosecuted to the Arches Court of Canterbury on behalf of the churchwardens, and the appeal came on to be heard before Sir Robert Phillimore, the Dean and Official Principal of the Arches, on the 4th of November, 1873.

A. J. Stephens, Q.C., and *W. G. F. Phillimore*, appeared for the appellants. It is apparent on the face of the monition that the promoter is not a parishioner of St. Peter's, Folkestone, and does not reside in the diocese of Canterbury. This is a fatal objection to the validity of the proceedings, for the monition must be construed as strictly as a record at nisi prius: *Turner* v. *Meyers* (1); and no sufficient interest being foreshadowed in it, the Court is bound to conclude that such a special interest as would alone allow of a civil suit being promoted in an ecclesiastical court does not exist here. That a special interest must be possessed by the promoter of a civil suit in an ecclesiastical court is too clear to be controverted: *Hooper* v. *Davis* (2); *Duke of Portland* v. *Bingham* (3); *Reg.* v. *Bishop of Chichester*. (4) It is moreover not only true that the action of an ecclesiastical court in a civil suit will be refused to any person who cannot shew a personal interest in the subject-matter, but it is also borne out by the authorities that the nature of the interest should be alleged either on the face of the citation, when the proceedings commence with a citation, or of the monition when a monition is issued, as in the present case: *Steward* v. *Bateman* (5); Stephens, Laws of the Clergy, vol. ii. p. 1018; *Liddell* v. *Beal* (6); *Williams* v. *Bott*. (7) It may be said on the other side that this objection to the monition cannot avail, as the defendants have appeared absolutely, and that, if they questioned the right of the promoter to take proceedings against them, they ought either to have appeared under protest or have

(1) 1 Hagg. Const. 414.
(2) 1 Lee Eccl. 640.
(3) 1 Hagg. Const. 157.
(4) 2 E. & E. 209; 29 L. J. (Q.B.) 23.
(5) 3 Curt. 201.
(6) 14 Moo. P. C. 1, 12.
(7) 1 Hagg. Const. 1.

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called upon the promoter to propound his interest. But, in the first place, it must be remembered that the defendants received a notice from the registrar of the Court below which justified them in assuming that the Court would hear the case on the monition, and that no further proceedings were contemplated; secondly, that an appearance under protest is only proper when an objection is taken to the jurisdiction of the Court, and the defendants have never denied that the Court had jurisdiction; and thirdly, that in cases in the ecclesiastical courts where parties have been directed to propound their interest it has always appeared on the face of the proceedings that some interest did in fact exist, whilst here no interest at all has been shewn. With respect to the promoter not being entitled to institute the suit in his official capacity, it is not likely at the present day that an ecclesiastical court would be prohibited from assuming jurisdiction, merely on the ground that the suit had been promoted on behalf of the Ordinary. It is, in fact, stated in the books that a bishop may sue in the spiritual court for a pension: 2 Phillimore's Ecclesiastical Law, p. 1593.

[SIR ROBERT PHILLIMORE referred to *Ex parte Medwin & Hurst.* (1)]

The present proceedings must be proceedings either in a criminal suit or in a civil suit, for proceedings which are neither civil nor criminal are unknown to ecclesiastical law. If the proceedings here are to be considered as criminal they must fail, because they have not been carried on in accordance with the Church Discipline Act, 3 & 4 Vict. c. 86. It must therefore be admitted that the proceedings are in the nature of a civil suit. The distinction which prevails with regard to civil and criminal suits is not peculiar to ecclesiastical law. It is from the same considerations that the common law, whilst it permits an indictment for obstructing an highway to be presented by any one, requires that a person bringing an action to recover damages for the obstruction must shew some special damage to himself. The case of *Duke of Portland* v. *Bingham* (2) is no authority to shew that the defendants ought to have called on the promoter to propound his interest, for in that case the interest possessed by Lord Portland was foreshadowed in

(1) 1 E. & B. 609; 22 L. J. (Q.B.) 169. (2) 1 Hagg. Const. 157.

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the original citation, and no further interest was at any time alleged; the interest so foreshadowed was merely amplified in the subsequent proceedings taken by him. Indeed it clearly appears from the report that where an interest has to be alleged, it must be alleged within the four corners of the citation, or of the monition in a case where the defendant is brought before the Court by a monition, as a monition is merely equivalent to a citation coupled with a direction to do some specified act. Indeed, on reference to the printed appendix in the case of *Liddell* v. *Beal* (1), it will be found that the framer of the citation in that case has carefully, and without doubt advisedly, recited in it the interest which Mr. Beal unmistakedly possessed at the commencement of the proceedings against Mr. Liddell.

Dr. Deane, Q.C., and *Cowie*, for the respondents. No necessity really exists for the interest of the promoter being stated on the face of the monition. If the defendants had pursued the proper course, they would have either appeared under protest or have prayed the Court to direct the promoter to propound his interest by act on petition. The present objection was taken before the promoter had appeared in the suit by his proctor, and at a time when there was really no contestatio litis. The precedent in *Liddell* v. *Beal* (2) has been relied on, but not only is that case opposed to the case of *Hopper* v. *Davis* (3), but one of the courses that the promoter contends ought to have been followed in the present case was followed by the advisers of Mr. Liddell, and not only an act on petition filed, but further pleadings entered into between the parties. The reason why the name and address is usually entered in the citation is for the purpose of informing the defendants of the position and residence of the promoter; this has been done here, and the defendants have therefore information that the suit is not promoted by a person who would be unable to pay costs. No reason has been shewn why the Court should hold the monition bad, and if it should be necessary for the promoter to shew an interest, non constat, that he would not be able to do so at the proper time. It may be that, on pleadings being entered into, the promoter would have propounded a sufficient interest, whether

(1) 14 Moo. P. C. C. 1. (2) 14 Moo. P. C. at p. 72.
(3) 1 Lee Eccl. 640.

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in an official capacity or otherwise. The judge of the Court below was not in the same position as the judge in the case of *Steward* v. *Bateman.* (1) It was certainly held in that case that the interest of the parties must be shewn on the documents before the Court, and that it could not be shewn by exclusive evidence; but here the case is different, for the official interest which could have been propounded by the promoter was within the knowledge of the Court below. It has been said that the monition in the present case is analogous to a record at common law, and therefore must be construed with the utmost strictness, but having in fact issued only at the commencement of proceedings, it surely cannot be concluded that it ought to be construed with the same strictness as a monition granted after final judgment. But no reference can rightly be made to common law analogies, for any attempt to do so can only mislead, inasmuch as it has been often said that the rules of the ecclesiastical law are not nearly so technical as those of the common law.

[SIR ROBERT PHILLIMORE referred to *Sherwood* v. *Ray.* (2)]

In conclusion, whatever validity there might be in the objection that no sufficient interest appears on the monition, supposing that objection to have been taken in the proper manner, it is clear that the defendants, having appeared absolutely, have estopped themselves from taking any advantage of it: *Prankard* v. *Deacle.* (3)

Stephens, Q.C., in reply.

Cur. adv. vult.

Nov. 14, 1873. SIR ROBERT PHILLIMORE. This is an appeal from a judgment of the Commissary of Canterbury. The question raised in this appeal is technical in point of form, but not unimportant in substance.

I must say, in the outset, that I have had difficulty in ascertaining, from the minutes of the court below, what the exact course of the proceedings in this case has been. The minutes appear to be entered or kept in an unusual and irregular manner; but I gather from the observations of the learned commissary that on the 22nd of February in this year certain proceedings were taken by Mr. Lee, on behalf of the archbishop, which, on the 12th

(1) 3 Curt. 201. (2) 1 Moo. P. C. C. 353, 397.
(3) Hagg. Eccl. 169, 185.

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of March, were discontinued and abandoned; and that on the 24th of March a monition was taken out against the vicar and churchwardens of St. Peter's, Folkestone, ordering them to shew cause why certain ornaments called "stations" should not be removed from the church.

The parties upon whom the monition has been served appear and take a preliminary objection, to the effect that it was not competent to the party who took out the monition to do so.

The suit is of a civil character. In the Ecclesiastical Court there are two kinds of suits—civil and criminal. The criminal suit, which is the promotion of the office of the judge, that is, of the ordinary, is open to any person whom the ordinary may think fit to allow to promote his office, by the institution of a criminal suit; such a suit is "ad publicam vindictam," and in some sense concerns every member of the church. The civil suit is not open to every one, even with the consent of the ordinary, but only to those who have a personal interest in it. It may indeed happen that a civil interest is protected or enforced by a criminal proceeding; but, nevertheless, the maintenance of this distinction between criminal and civil suits is by no means unimportant in principle. The preservation of peace in the church generally, as well as in particular parishes, may in great measure be dependent upon the observance of it.

The inhabitant of a parish in Cornwall may be interested in preserving ecclesiastical discipline and enforcing ecclesiastical criminal law in a parish in Northumberland, and may be permitted by the Ordinary to take legal steps for this purpose; but it would be a great evil if he could interfere in matters relating to the fabric of a church in Northumberland, in which he has no private interest, as to which he has sustained no civil injury, and as to which he may be acting in opposition to the wishes of the parishioners and the incumbent. However this may be, the law as to the practice of the Ecclesiastical Court in this matter is perfectly well established; and, indeed, it was not at all disputed by the counsel for the respondent, whose contention was not that, in a civil suit, interest must not be shewn, but that the time had not arrived when the interest of the party proceeding in this civil suit ought to be set out.

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The suit, I may observe, is not the less of a civil character because the proceedings have been carried on by monition rather than by the more formal way of libel; but it is necessary, in order to remove some confusion which appears to have arisen, to state what the nature of this method of civil proceeding by monition is.

In the first place, it is not to be confounded with a monition to execute the process of a court after sentence given.

The monition in the present case operates as a citation and something more; for it includes the order to appear, which is the proper function of a citation, and also orders a certain thing to be done by the party cited, which is the proper function of a monition.

The party so cited might have taken one of three courses; he might have appeared and demanded a more formal proceeding by way of libel, or by the less formal way of act on petition; but he might also have made his defence by appearing in obedience to the monition and shewing cause against it to the Court. This is the course which he elected to pursue, which it would seem that the party proceeding himself intended, and which the Court contemplated.

It was, therefore, a suit conducted in the summary manner of monition, including citation and appearance of parties; I say of parties, because, although, for some reason unexplained, Mr. Lee, on the 9th of June, prayed to appear by a proctor, he had extracted, on the 24th of March, the monition, which on that day was, as the instrument recites, "at the petition of the said John Benjamin Lee decreed."

The monition having been so decreed, was served on the vicar and churchwardens on the 25th of March. On the 31st a proctor appeared for them. It should be here observed that the Commissary Court has not regular days of sitting, but they are appointed from time to time.

On the 14th of May, the following letter was sent to the proctors acting for the vicar and churchwardens:—

"28, Great George Street, Westminster,
"14th May, 1873.

"Re St. Peter's, Folkestone.

"Dear Sirs,—It is my duty hereby to give you notice, as proctors for the Rev. C. J. Ridsdale (the incumbent) and the church-

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wardens, that the commissary general of the city and diocese of Canterbury has appointed Tuesday next, the 20th instant, at eleven o'clock a.m., in the public library of Lambeth Palace, to hear this case; and as the "stations of the cross" have not been removed, as promised, the commissary general will not attend to any further application for delay.

"I am, dear sirs,

"Yours faithfully,

"John Hassard,

"Registrar of the Diocese of Canterbury.

"To Messrs. Brooks, Tanner, & Jenkins, Proctors,

"7, Godliman Street, E.C."

This document must be treated as one of the minutes in the cause, amongst which it ought to have been found.

On the 26th of May the churchwardens, by their proctor, prayed the "judge to dismiss the said churchwardens from the suit, with costs, on the ground that the said John Benjamin Lee did not shew any interest of a public or private character on the face of the said monition."

This was, in my opinion, the proper way of raising the question as to the competence of the party proceeding. It appears to have been raised at the earliest period practicable. It was suggested that there ought to have been an appearance under protest; but this was not much insisted upon by counsel, and I think it was rightly answered, that in this case the objection was taken, not to the competency of the Court, but to the competency of the party instituting the suit. Although in cases of this kind there have been proceedings under protest, that course is never properly adopted except when there is an objection to the jurisdiction of the Court.

The learned judge of the Court below, however, on the 9th of June, rejected the prayer of the parties cited to be dismissed from the suit. From this sentence this appeal has been made to this Court.

I have already stated my opinion that this is a civil suit, and that a contrary opinion was not maintained by counsel for the respondents before me, but I must add that I do not quite follow the reasoning of the learned Commissary upon this point; he does not, and could not, intend to say that this was a criminal suit, but

he seems to have thought it belonged to a tertium genus, neither civil nor criminal.

I know of no authority in principle or precedent for this position; perhaps, however, I am mistaken as to the learned judge's opinion upon this point. In the arguments before me the following propositions were not controverted:—

(1.) That the suit is of a civil character.

(2.) That the party proceeding must shew an interest.

(3.) That at present he has not shewn such interest.

To the undisputed points I may add:

(1.) That no precedent for a monition not shewing an interest in a civil suit of this kind has been produced before me.

(2.) That I have requested the registrar to search for such a precedent, and that he has not been able to find one.

(3.) That the precedents, and especially a very recent and important one, support the opinion that the interest must be shewn in the monition. Upon this last point I will advert to the following cases; others might be found, but they seem to me sufficient for the present purpose:—In the *Duke of Portland* v. *Bingham* (1), two suits were instituted; the first was civil, which failed on the ground that the Duke of Portland had no interest; the proceedings were by citation to bring in a licence: the second was criminal, which failed on other grounds. In the civil case, Dr. Bingham appeared under protest, alleging no interest in the duke. After considering the question of civil interests, Lord Stowell observes: "There are other interests, indeed, in which every man partakes, such as that of maintaining public order. Such interests are clear, direct, and universal, and will entitle any one to institute proceedings to preserve that order. But such proceedings must be ad publicam vindictam and by criminal articles exhibited in due form, which is the usual and the most convenient way of trying such matters as the present. In that case the question would be reduced to one point only—the right of the party who is the object of such proceedings; whereas, in civil suits, a previous question may arise of equal difficulty, on the right and title of the party instituting the suit. This, then, is an important distinction."

(1) 1 Hagg. Const. 157.

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In the civil case, Lord Stowell's attention had been drawn to *Line* v. *Harris* (1) as an authority for the civil form of procedure, and his observations on it are remarkable: "In that case," he says, "there was a civil injury sustained."(2) *Line* v. *Harris* (1) was a proceeding by citation to shew cause why a licence should not be revoked. The citation was taken out by the vicar against the curate, who officiated without his leave in his parish.

The case of *Hopper* v. *Davis* (3) was a decision by the High Court of Delegates. Chapel-wardens had cited a man to shew cause why he should not be monished to take down a monument erected without a faculty. The judge of the Court of York had granted the monition. Dr. Hay, one of the most learned civilians of this country, said arguendo (p. 647): "First question, whether this, which is a civil cause, is properly instituted? The chapel-wardens have no interest; but no man can commence" (observe the words) "a civil cause that has no interest." The judges delegate adopted this position, for they reversed the sentence of the Court below, and said: "We were of opinion the suit was commenced in a wrong form; a prosecution of this sort ought to be by articles."

In later times, it has been holden, where no objection is raised, that suits of this kind may be instituted in the civil form, but never unless the party proceeding to enforce the law has shewn an interest in the first instance.

The *Knightsbridge Cases* (4), as they are generally called, are directly in point. In the first of these cases, questions as to the lawfulness of certain ornaments in the church were raised. The civil suit began by a monition, the words of which, so far as they are important to the present cause, were as follows:—

"Charles James, by divine permission Bishop of London, &c., &c. Whereas it hath been alleged and set forth before the Right Honourable Stephen Lushington, Doctor of Laws, our vicar-general and official principal of our Consistorial and Episcopal Court of London lawfully constituted, by the proctor of James Beal, an inhabitant of that part of the district chapelry of Saint Paul's, Knightsbridge, which though not formally assigned as a

(1) 1 Lee, Eccl. 146.
(2) 1 Hagg. Const. 160.
(3) 1 Lee, 640.
(4) *Beal* v. *Liddell* and *Westerton* v. *Liddell*. Moore's Special Report, 1857.

district to, is more immediately connected by its locality with, the said chapel of ease dedicated to St. Barnabas, in the county of Middlesex, and within our diocese and jurisdiction: That the chancel, &c., &c."

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Observe with what extreme care and precision the interest of Mr. Beal, who was commencing the suit, is set forth. He is described as an inhabitant of that part of the parish in which the chapel is situated, though no district has been formally assigned to it, that is, he represents himself as being injured in his right as a parishioner, and as having a title, as a parishioner, to take legal proceedings.

But the force of this recent and well-considered precedent goes further. The Privy Council allowed some and disallowed other ornaments, the legality of which was the subject of this suit. With respect to the latter, they issued a monition for their removal and alteration. Mr. Beal complained that this monition had not been properly executed; but when he appeared before the Privy Council, it came out that he had ceased to be an inhabitant of the district of St. Barnabas. The learned Commissary and myself were counsel against him, and so important did it appear to us that the rule of practice as to shewing an interest should be maintained, that for this purpose we formally made the objection, which we afterwards withdrew, that Mr. Beal had no interest to continue the suit though he had lawfully began it. Mr. Moore's report of the case is quite correct; it is as follows:—

"The counsel for the respondents took an objection, which they did not press, to Beal being heard, as he had ceased to be a parishioner or inhabitant within the district of St. Barnabas, and therefore had no locus standi in an ecclesiastical court.

"Their Lordships intimated their opinion that the objection in general law and practice was correct, and that it was only in the particular circumstances of the case, and having regard to the waiver of the objection by the incumbent and churchwardens, that Beal would be allowed to proceed, but that the permission granted him was not to be considered a precedent." (1)

Here a party who had been qualified by his civil interest to begin the suit became disqualified by the loss of that interest from

(1) 1 Moo. P. C. C. at p. 12.

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continuing it. Here is no suggestion that the question must be raised by formal pleading or by appearance under protest. It would be difficult, I think, to conceive a stronger precedent in favour of the appellants' contention.

It should be mentioned that no official interest, so to speak, is set up in this case, indeed could not be, for "the office of the judge is not promoted," which we all know requires a criminal suit and a proceeding by articles; and as one of the defendants is a clerk in holy orders, a proceeding must have been taken against him under the statute. Nor is it irrelevant to notice that even if the ordinary were conducting his visitation, and was required to order the removal of an improper or illegal ornament in a church, such a requisition must be the subject of a presentment made to him by the churchwardens or sidesman, who are necessarily parishioners, or by the incumbent. I am of opinion that the monition in this suit, disclosing as it did no interest, but rather a want of interest in the party proceeding, was bad upon the face of it.

I think that the party cited had a right to judgment upon that point in his favour at the time when, in obedience to the monition, he appeared to shew cause, even if he had not, as in point of fact he had, received notice through the registrar that no further delay would be allowed.

It has been suggested that the objection to the competence of the party proceeding ought to have been taken by formal pleading; but why? The fault was patent, and, moreover, could not have been remedied by pleading. The party proceeding was not entitled to take out the monition to commence a civil cause, as Dr. Hay says in the course of his argument above referred to.

The interest required in this particular case is the status of a parishioner of St. Peter's, Folkstone, in the diocese of Canterbury; but the party proceeding has described himself as of No. 2 Broad Sanctuary, in the city of Westminster, and, therefore, the diocese of London. He could not be allowed, without consent of the parties cited, to alter this designation, under which he began this suit, by further pleading. It being incumbent on him in the first instance, in order to entitle him to take out a monition, to allege that he had an interest; he had not only failed to do so, but had in effect stated the contrary. The party cited had a right to be

dismissed from this suit, according to principles and according to the precedents to which I have adverted.

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I am very sorry to differ in opinion from the learned Commissary of Canterbury; but, after a very careful examination of his learned judgment, I am compelled to do so.

I must reverse the sentence of the Court below, and dismiss the churchwardens from this suit, with proper costs.

Proctor for appellants: *Brooks.*

Proctors for respondent: *Moore & Currey.*

THE RIO LIMA. (6471.)

Nov. 19.

Costs—Possession Fees—County Court Admiralty Jurisdiction.

Where an Admiralty suit is instituted in a county court against a vessel which is under the arrest of the Court of Admiralty, it is unnecessary, so long as the vessel remains under such arrest, for the officer of the inferior court to incur expense in placing a person in possession, and a double set of possession fees will not be allowed.

Nov. 18. *W. G. F. Phillimore,* on behalf of the plaintiffs, moved to review the taxation of the plaintiffs' bill of costs.

The circumstances of the case were as follows:—On the 10th of March the vessel *Rio Lima* was arrested under process issued out of the High Court of Admiralty. After this arrest, and the same day, and whilst the deputy of the marshal of the High Court remained in possession, the high bailiff of the county court of Northumberland arrested the vessel under process of the said county court, issued in an Admiralty cause instituted in that court, and placed a deputy in charge. On the 20th of March the solicitor for the defendant in the county court cause wrote a letter to the high bailiff, which was in substance as follows:—

"6, Copthall Court, London, E.C.,
"March 20th, 1873.

"*Rio Lima.*

"Sir,—I am informed by the marshal of the Court of Admiralty that a person has been put on board this steamer at the instance of a suitor in your county court. The vessel is under arrest in

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three suits instituted in the Admiralty Court, and the expense in keeping the man above referred to on board will not be allowed as an item in the account-sales upon sale of the ship. I will undertake, before the vessel is released, due notice shall be given to you, so that, if it is considered advisable so to do, possession may be taken by the plaintiffs in your court; but if, notwithstanding this, the man is continued on board, the additional expense occasioned by his remaining on board will have to be borne by those who instruct him.

"R. Miller.

"To the high bailiff of the county court,
Northumberland."

On the 21st of April an order was made by the judge of the High Court, transferring the county court cause to the High Court. Afterwards, and before the county court cause came on for hearing, the county court cause was settled by arrangement, and the registrar proceeded to tax the plaintiffs' bill of costs. The bill contained an item of 16*l.* 13*s.* 6*d.* for charges made by the high bailiff for possession fees from the 10th of March to the 22nd of April. This item the registrar disallowed, and the object of the motion was to have the bill of costs referred back to the registrar, with directions to the registrar to allow the item. In support of the motion an affidavit was filed, in which it was deposed that, until the receipt of the said letter of the 20th of March, neither the high bailiff nor the plaintiffs' solicitors had any knowledge of the vessel being under the arrest of the High Court.

E. C. Clarkson, contrà.

Cur. adv. vult.

Nov. 19. SIR ROBERT PHILLIMORE. This is an objection to the disallowance of one item in the taxation of the plaintiffs' costs by the registrar.

That item consists of the high bailiff's charge for possession of the vessel *Rio Lima* during forty-four days, from the 10th of March to the 22nd of April, under a warrant issued from the county court of Northumberland; the amount disallowed is 16*l.* 13*s.* 6*d.* At the time this warrant was served the *Rio Lima* was already under arrest under two warrants from this Court, and in possession of the

marshal's deputy. Both these warrants had been served at an earlier hour of the same day (the 10th of March in this year) on which the county court warrant was served. The warrants had been issued on the 7th and 8th of March; the return shewed they were served in the usual manner by affixing the warrant, and afterwards the copy, to the mast of the vessel.

The vessel was subsequently arrested by warrants from this Court in three other suits, namely, in a cause of possession on the 18th of March; of masters' wages on the 21st of March; of co-ownership on the 29th of May.

For holding possession of the vessel in all these five causes the marshal has charged only one set of possession fees.

I am by no means prepared to say that if the county court arrest had been first in order of date the subsequent arrest by the superior court would not have dispossessed the officer of the inferior court.

But here the question is, whether it was necessary or justifiable that whilst the ship was thus in the custody of the superior court a second person should be placed, under the county court warrant, in possession of the ship?

The practice of this Court with respect to cases in which proceedings have been taken in this court and in the county court has been established for some time. In such cases I have invariably exercised the power given me, under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), of transferring all the proceedings to this court, thereby, I believe, saving much expense and delay to the suitors.

The plaintiffs ought to have been, and must have been, aware of this practice, and they applied on the 21st day of April to this Court for an order to remove the suit from the county court into this court. The order was granted. This course should have been taken in the first instance. Moreover, an arrangement to avoid the expense of this double possession might easily have been made with the Custom House officer who acts as the deputy of the marshal on these occasions. He might have been instructed by the plaintiffs, in the event of the vessel being released from the warrants of the High Court of Admiralty, to retain her under the county court warrant. The marshal has shewn me a letter from

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his deputy, dated the 25th of March, in which is the paragraph: "I have given notice to the party on board, under the county court Admiralty jurisdiction process, that the vessel was, before he was placed on board, and still remains under arrest under an Admiralty warrant;" and in the affidavit sworn by the plaintiffs' solicitor at Newcastle I find this paragraph: "I have been informed, and verily believe, that previous to the institution of the suit in the county court at Newcastle three different suits had been instituted in this Honourable Court, and the said Court was, and still is in possession of the said vessel."

I am of opinion that the plaintiffs were bound to know that the vessel was in possession under the warrants of this Court, and moreover, that the fact was distinctly brought to their notice, by the correspondence which is set out in this case, a month before they applied to transfer the cause, and that the charge for possession fees for forty-four days under the county court warrant was rightly disallowed by the registrar. I agree with the observation that the County Courts Admiralty Jurisdiction Acts were not drawn with due care or, perhaps, adequate knowledge of the practice of this Court; but that is no reason why I should put such a construction upon them as would result in the defendant being made to pay a double set of fees to the plaintiffs for the detention of his vessel in a case where no concurrent possession was necessary.

I dismiss the motion with costs.

Solicitors for plaintiffs: *Ingledew, Ince, & Greening.*
Solicitors for defendant: *Simpson & Cullingford.*

THE CITY OF CAMBRIDGE. (L. 76.)

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Nov. 21.

Damage—Compulsory Pilotage in the Mersey—21 & 22 Vict. c. xcii., s. 139—Meaning of "proceed to Sea."

A large steamship, bound for a foreign port and fully equipped for her voyage, left dock in the port of Liverpool about 11 p.m. She had a pilot on board, and those in charge of her intended to take her out to sea at once. But after she got into the river it was determined that she should anchor there for the night, and cross the bar in the morning. The pilot remained on board, and by his direction the vessel was brought up by her port anchor and sixty fathoms of chain. The ebb tide began to make soon after the vessel was brought up, and the pilot remained on deck until she was three-parts swung to the ebb. He then went into a house on the deck under the bridge, and left orders that he was to be called if he was wanted. Whilst he was in the deck-house the vessel parted her cable; the pilot came on deck almost immediately afterwards, and under his directions efforts were made to bring the vessel up by her starboard anchor, but it did not hold, and although her fires were banked and steam was up, the vessel was allowed to drift down the river until she came into collision with a ship at anchor:—

Held, that the pilot was to blame for the collision, and that the vessel was "proceeding to sea" within the meaning of the Mersey Docks Consolidation Act, 1858, so as to render the employment of the pilot compulsory by law.

THIS was a cause of damage instituted on behalf of the owners of the ship *Birmah* against the *City of Cambridge*, a screw steamship. The petition filed on behalf of the plaintiffs alleged in substance as follows:—

On the evening of the 26th of February the *Birmah* was brought to anchor in the river Mersey to the N.E. of Egremont Ferry.

Two regulation anchor lights were hoisted, one on the forestay, the other on the gaff end of the *Birmah*, and these continued to burn brightly up to the time of the collision. A good look-out was kept. It was high-water at about 11.10 p.m., and at about 11.30 p.m. the *Birmah* swung to the ebb tide.

At about 2.30 a.m. of the 27th of February, those on board the *Birmah* perceived the *City of Cambridge* about a quarter of a mile off, and a little on the port bow of the *Birmah*. Smoke was coming from the funnel of the steamer, but she appeared to be drifting rapidly with the ebb tide towards the *Birmah*.

The *City of Cambridge* continued to approach the *Birmah* until she struck her heavily with her starboard bow. In less than half an hour from the time of the collision the *Birmah* sank.

The said collision was wholly caused by the negligence and misconduct of those on board the *City of Cambridge*. They neglected to keep clear of the *Birmah*. They neglected to keep a proper look-out.

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The answer filed on behalf of the owners of the screw steamship *City of Cambridge* was in substance as follows:—

At about 11 p.m. on the 26th day of February the screw steamship *City of Cambridge*, of 1489 tons register, fitted with engines of 200 horse-power nominal, and manned by a crew of forty-six hands, all told, left Morpeth Dock, in the port of Liverpool, on the way to sea, on a voyage to Calcutta, with a general cargo and passengers, in charge of a duly licensed Liverpool pilot.

At such time the *City of Cambridge* was properly furnished and equipped, and in all respects ready for sea. It was intended that she should, as a matter of precaution, come to anchor in the Mersey until daylight, and that she should then leave the river; but it was necessary for her to leave the Morpeth Dock at the aforesaid time, in order that she might so leave the Mersey at daylight.

The *City of Cambridge* was accordingly brought to anchor in the Mersey by her said pilot about abreast of the Woodside landing-stage, and a little on the Cheshire side of mid-river, by her port anchor and about sixty fathoms of chain.

About 12.15 a.m. on the following day the wind was blowing fresh from the north-westward, with squalls and showers, and the night was dark and the tide was strong ebb, and the *City of Cambridge* was still at anchor in her said berth, with her proper riding lights duly exhibited and burning brightly, and with her fires banked and a proper watch being kept, when her said port cable parted, and she began to drift down the river athwart the tide.

By order of her said pilot steam was got on the *City of Cambridge*, and her helm was put a-starboard, and endeavours were made to get her head on to the tide, and shortly afterwards, by order of the said pilot, her engines were stopped, and her starboard anchor, which was in readiness, was let go. She was then over towards the Cheshire shore.

A large scope of chain was given to the starboard anchor, but it failed to bring the *City of Cambridge* up, and she continued to drift, and the pilot thinking that it might be foul, it was, by his order, hove up and sighted, and found to be clear. The *City of Cambridge* continued to drop down the river, looking out for a berth in which to bring up, her engines and helm being used as directed by the pilot for the purpose of keeping her clear of the vessels at anchor.

When the *City of Cambridge* had got a little to the northward of Egremont Ferry the *Birmah*, the lights of which had, with other riding lights, been previously seen, was noticed on the starboard quarter of the *City of Cambridge*, distant about two or three ships' lengths. At this time there were several other vessels at anchor near. By order of the pilot the engines of the *City of Cambridge* were set ahead full speed, and her helm was put hard a-starboard, but the tide taking the *City of Cambridge* so quickly towards the *Birmah* that it appeared that these measures would not enable the *City of Cambridge* to clear the *Birmah*, the engines of the *City of Cambridge* were reversed full speed astern, but the *City of Cambridge* with her starboard bow and anchor came into collision with the port bow of the *Birmah*, and so much damage was thereby done to the *Birmah* that she subsequently sank.

Save as herein appears, the defendants deny the truth of the several allegations contained in the petition filed in this cause.

The *City of Cambridge* parted from her said port anchor without any negli-

gence on the part of the defendants or those on board her, and owing to her great length, and the strength of the tide, and the state of the weather, and of the number of vessels in the river, those on board her were unable to avoid the said collision, which was, so far as the *City of Cambridge* was concerned, the result of inevitable accident.

Before and at the time of the said collision the *City of Cambridge* was in a district and under circumstances in which the employment of a qualified pilot was compulsory by law upon her and her master and owners, and before and at the time of the said collision the *City of Cambridge* was in charge of a duly licensed and qualified pilot, the employment of whom was compulsory by law, and all the orders of such pilot were duly obeyed by the master and crew of the *City of Cambridge;* and if the said collision was not occasioned by the negligence of those on board the *Birmah*, and was not the result of inevitable accident, so far as the *City of Cambridge* was concerned, it was occasioned by the fault or incapacity of the said pilot.

Nov. 19, 20, 21. On these days the case was heard. The result of the evidence appears from the judgment.

Butt, Q.C., and *Gully*, for the plaintiffs, contended that the onus rested upon the defendants to prove affirmatively that the master and crew of their vessel had not in any way contributed to the collision, and that they had failed in doing this: *The Iona.* (1) They also urged that as the pilot on board the *City of Cambridge* was in a house on deck at the time the cable parted, he was not in in charge of the deck, and could not be held responsible for the negligent management of the vessel at that time: *The Mobile* (2); *The Christiana.* (3)

Sir John Karslake, Q.C., Milward, Q.C., and *E. C. Clarkson*, for the defendants. The parting of the cable of the *City of Cambridge* was an inevitable accident. If there was any negligence on the part of those in charge of the *City of Cambridge*, the pilot is the person responsible. His orders were strictly obeyed; his absence from the deck was only temporary, and he never resigned his charge of the vessel.

SIR ROBERT PHILLIMORE. This is a case of collision in which the damage done appears to amount to a very considerable sum, and, no doubt, the question to be decided by the Court is one of great importance to the suitors in this case. At the same time the facts and the history of the case do not appear to present any peculiar difficulty.

(1) Law Rep. 1 P. C. 426. (2) 10 Moo. P. C. 467. (3) 7 Moo. P. C. 160.

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The collision took place between the *City of Cambridge*, a very large steamer of 1489 tons register, with engines of 200 horse-power nominal, and a sailing-ship, an iron vessel called the *Birmah*, of 797 tons register. The damage was done in the River Mersey; the starboard bow of the *City of Cambridge* and her starboard anchor struck the *Birmah* on her port side, near her fore-rigging, and the *Birmah* almost immediately filled with water and sank. The crew were saved by a tug, and no blame whatever attaches to those on board the *City of Cambridge* in respect of their conduct after the collision took place.

Now, the case presents to the Court four subjects for consideration, and the first of these appears to be—was the *City of Cambridge* to blame for this collision? Secondly, if the *City of Cambridge* was to blame for the collision, as she had a proper pilot on board, the question arises, were his orders duly obeyed? Thirdly, did the crew or officers on board the *City of Cambridge* in any way contribute to this collision? Fourthly, did the *Birmah* contribute to the collision by any misconduct on her part?

Now, the facts of the case lie in a very narrow compass and may be very briefly stated. The *City of Cambridge* was, as I have said, a very large steamer, which was on a voyage to Calcutta with a general cargo and passengers, and she was under the charge of a duly licensed Liverpool pilot, who came on board her when she was in Morpeth Dock, at about eleven o'clock at night on the 26th of February of this year. Under his advice the steamship was brought out of the Morpeth Dock, and when she was about abreast of the Woodside landing-stage she was anchored on the flood tide, which was then running at about three knots an hour. She was anchored by her port anchor and about sixty fathoms of chain. This would be between eleven and twelve o'clock. The ebb tide, which ran at the rate of about six knots, began to make at about twelve o'clock—shortly before twelve o'clock, I think—and the pilot, after the vessel had been, as he said, three-parts swung to the ebb tide, went into what is called the chart-room, which was a sleeping-room on the deck under the bridge, giving orders to be called in the event of any unforeseen emergency arising which required his presence on deck. He left a proper number of men

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on deck, and the proper officer, the quartermaster, was left near the helm. About a quarter-past twelve, or a little later, the vessel gave a sudden sheer, the consequence of which was that the chain cable of her port anchor snapped, and the anchor was lost. It appears that the pilot came out of the chart-room almost immediately afterwards—it is difficult to say exactly what time elapsed, but it must have been very inconsiderable—and he gave directions that steps should be taken for getting her head as far as possible on to the tide, and she went drifting, as I understand, stern foremost down the river under steam, for some time, without any anchor down; but after she had drifted so about twenty minutes, the starboard anchor was let go. The starboard anchor did not hold, but the vessel continued to drift, and dragged the anchor; and about twenty minutes before the collision, which took place between a quarter-past two and thirty minutes past two, the starboard anchor, under the advice of the pilot, was hove up and sighted, and was found, not as was expected, to be foul, but to be clear. This was about twenty minutes before the collision. The vessel, thus drifting downwards stern foremost, was manœuvred from time to time, so as to avoid the shipping through which she was drifting. There seems to have been a great many vessels lying in that part on that night, and at last this catastrophe happened while the *City of Cambridge* was trying to avoid the *North Star*, a vessel on her port side; she just escaped doing mischief to her when she ran, as I have already said, with her starboard bow and anchor into the port side of the *Birmah*, which was lying at anchor there, and caused her to sink. The whole distance the *City of Cambridge* passed over during this extraordinary expedition seems to have been about a mile and a quarter or a mile and a half—it was said to be, by nautical measurement, about a mile and a half. The place of collision was off Egremont, and she drifted from Woodside.

Upon these facts the first question arises—was the *City of Cambridge* to blame for the collision? And there are a variety of questions which I have had to put to the Elder Brethren of the Trinity House, in order that I may be guided by their advice upon the principal nautical points which arise in this case; and first, they are of opinion that she ought to have had more cable

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let out in the first instance—that sixty fathoms of cable was not sufficient, but that, at all events, when she swung to the ebb tide, expecting, as she must have done, a spring tide of six knots, then more cable should have been veered out. It is in evidence in the case that she had 150 fathoms of cable on each anchor which was available for use.

The Elder Brethren think also that the pilot was to blame for leaving the deck when he did—that he ought not to have gone away into the chart-room when she was three-quarters swung to the ebb tide—he ought to have waited till she was fully swung, and himself superintended that manœuvre, and seen that her helm was properly put. He left her helm amidships. No blame attaches to the *City of Cambridge* with respect to the men that were left on deck—there seem to have been sufficient men, and they were properly placed. It is to be observed that when the vessel swung the wind and tide were opposed, and no blame at all attaches, in the opinion of the Elder Brethren—with which I agree—to Boyle (1), the quartermaster, in the manœuvre which he effected. He executed the right manœuvre in counteracting the sheer the vessel had taken, and there was no delay in executing it; nor is there any reason to suppose that the pilot, if he had been on deck instead of in the chart-room, would have directed anything to be done different from what was done in his absence.

The next observation which the Elder Brethren of the Trinity House make is this: that the starboard anchor ought to have been ready to have been dropped, or ought to have been dropped

(1) Boyle was a witness called on behalf of the defendants. He stated: "I am a quartermaster on board the *City of Cambridge*. I went to the wheel on the bridge at twelve o'clock. The chief officer was standing below the bridge. I stayed at the wheel until the chain broke; at the time the chain actually broke I was standing with the wheel in one hand, just putting it over a-starboard to right the vessel in the stream; it was necessary to be done, because, if not, the ship would reach ashore by the current. The ship gave a little sudden roll when the chain of the port anchor broke. I then called the chief officer and immediately sent word to the pilot, and the pilot came on deck. Before the pilot came on deck I had got an order from the chief officer to go to the engine-room and to give her all the steam they possibly could, or we would get ashore if the steam was not got up. I went to the engine-room with my message. The pilot was below then; he was just coming up as I came up. He was in the chart-room."

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instantly, if it was intended to rely upon it. But the real and principal matter of blame in this case is as follows:—The *City of Cambridge* ought never to have been allowed to go down the river stern foremost, as she was, into a crowd of shipping, scarcely avoiding one vessel before she was nearly into another, and in the opinion of the Elder Brethren, it is really a matter of great astonishment that she did not do more damage than she actually effected. She ought to have gone ahead, at all events, immediately after she sighted the starboard anchor and found it clear, in the way I have described. The ship might have been under perfect command, and she ought to have been brought up in the Sloyne, and to have waited there till daylight. Upon that point the Elder Brethren of the Trinity House have no hesitation at all, nor have I any doubt that their judgment is perfectly correct.

With respect to the second point, I find upon the evidence that the pilot's orders were duly obeyed; and with respect to the third point, I have taken into my careful consideration the ingenious argument of Mr. Butt; nevertheless, I am of opinion, under the advice of the Elder Brethren of the Trinity House, that the crew on board the *City of Cambridge* cannot be said in any way to have contributed to the collision. There was no want of look-out, and no want of due notice, on the part of those whose duty it was to keep a look-out, to the pilot.

Lastly, I come to consider the question which is fourth in order—whether the *Birmah* contributed in any way to this collision? The *Birmah* was riding with her starboard anchor quite steady, with seventy-five fathoms of chain; although in more shoal water, with more chain than the *City of Cambridge*. She certainly did not sheer, in our opinion, into the *City of Cambridge;* but the truth is told in the log kept on board the *City of Cambridge*—that that vessel sheered into her. She was lying quiet, and it matters not, in the opinion of the Elder Brethren, whether her helm was lashed to port or starboard; though I am bound to say that the evidence shews that she had her helm two or three spokes to port before the collision took place.

Upon these facts I can, of course, come but to one conclusion, namely, that the *City of Cambridge* is solely to blame for this collision.

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There remains another question to be discussed, namely, the question of law applicable to the pilot, as to which it is not necessary to detain the Elder Brethren.

The counsel for the plaintiffs and defendants were then heard upon the question whether the employment of the pilot on board the *City of Cambridge* was compulsory by law. The following sections of the Mersey Docks Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), were referred to:—

Sect. 123. "If any person shall pilot any vessel into or out of the port of Liverpool without having been first duly licensed by the board to act as a pilot, or after the expiration of his licence and before the same shall have been renewed, he shall for every such offence be liable to a penalty of not exceeding twenty pounds."

Sect. 138. "If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings, and no more, provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or, being inward bound, shall enter the river Mersey."

Sect. 139. "In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast or under the burden of one hundred tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same."

The counsel for the defendants contended that at the time the cable broke the *City of Cambridge* was proceeding to sea within the meaning of the 139th section, and that the pilot was employed by compulsion of law from the time the vessel left dock until the collision: *Rodrigues* v. *Melhuish* (1); *The Annapolis* (2); *The General Steam Navigation Co.* v. *The British and Colonial Steam Navigation Co.* (3)

The counsel for the plaintiffs contended that there was no

(1) 10 Ex. 110; 24 L. J. (Ex.) 26. (2) Lush. 295; 30 L. J. (P. M. & A.) 201.
(3) Law Rep. 3 Ex. 330; Law Rep. 4 Ex. 238.

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compulsion on outward bound vessels to take a pilot until the time of actually proceeding to sea. The *City of Cambridge* need not have employed a pilot to take her out of dock, and the law certainly did not require her to remain in charge of a pilot while at anchor in the river.

SIR ROBERT PHILLIMORE. As my own private judgment is strongly adverse to the immunity of a wrong-doer, on the ground of compulsory pilotage, I should be not at all sorry if I could come to the conclusion which has been pressed upon me by the argument for the plaintiffs, but I cannot do so. It seems to me that the 139th section must be construed, as far as one can apply it to this Act of Parliament, according to the light of common sense. Now, what is this section? [His Lordship here read the material portion of the section.]

It appears to me that the real point to which the Court's mind must be directed is—what did the legislature mean by the words "shall proceed to sea"? It could not be intended that the offence of refusing to take on board a pilot should not be completed until the vessel was actually at sea, because the section provides that the master must take the pilot, the first who shall offer himself, for the purpose of taking him to sea.

Now, in this case what was the state of the vessel? The state of the vessel was this: she was in every way equipped for her long voyage to Calcutta. There is no doubt upon the point. What are the facts? That she intended to go to sea, but that after a conference between the captain and the pilot, who had been taken on board for the purpose of going to sea (a conference which had been brought about by the circumstances of the night and other reasons), as to whether it was expedient she should go to sea that night or wait till morning to cross the bar, it was determined to lie in the Mersey that night, and cross the bar in the morning.

Shortly after she had begun to lie in the Mersey, the collision happened; and in these circumstances can I really come to the conclusion that the vessel was not proceeding to sea, because an accidental circumstance prevented her from going to sea that very night? It was, as I think, fairly enough put by Sir John Karslake

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in this case that her staying outside the dock that night was a step in her progress of procedure to sea. I must think that common sense compels me to put that construction on the statute, and having a strong opinion upon it, I do not see why I should delay expressing it to-night; although if there is any desire of the parties that I should delay it and give a more elaborate judgment, I would do so; but I see no reason myself why I should delay expressing my opinion that this was a compulsory pilotage under the statute.

Solicitors for plaintiffs: *Simpson & North.*
Solicitors for defendants: *Duncan, Hill, & Parkinson.*

Dec. 18.

THE PIEVE SUPERIORE. (6642.)

Damage to Cargo—Goods carried into any Port in England or Wales—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6.

A foreign ship was chartered to load a cargo of rice at a port in the East Indies, and therewith proceed to Belle Isle, Scilly, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom or on the Continent between Havre and Hamburg. The vessel loaded her cargo and proceeded to the port of Falmouth, and there received orders to go to Bremen, where she discharged her cargo. It was alleged that the cargo had suffered damage in the vessel. After discharging her cargo, the ship sailed to Cardiff on a new voyage, and was there arrested in a suit instituted on behalf of the consignees of the cargo of rice under the 6th section of the Admiralty Court Act, 1861:—

Held, that the cargo of rice was carried into a port in England within the meaning of the words in the 6th section of the Admiralty Court Act, 1861, and that the Court had jurisdiction to entertain the suit.

Affirmed 42 L.T.R. 482.

THIS was a suit instituted against the Italian barque *Pieve Superiore* under the 6th section of the Admiralty Court Act, 1861. The barque having been arrested, her owner appeared under protest and filed the following petition on protest.

The petition was, so far as material, as follows:—

1. By charterparty dated London, the 30th of March, 1872, and Genoa, the 6th of April, 1872, between the defendant and Ferdinand Schiller, for self and partners of Messrs. Borradaile, Schiller, & Co., of Calcutta, merchants and freighters, it was mutually agreed that the above-named ship should, with all convenient speed, having liberty to take outward cargo $\frac{\text{and}}{\text{or}}$ passengers from Europe to a port on the way for owner's benefit, sail and proceed thence to Akyab, for orders to load at either Akyab, Rangoon, or Bassein, and there load

from the agents of the said frieghters a cargo of rice in bags, which the said freighters bound themselves to ship; and being so loaded, should proceed therewith to Belle Isle, Scilly, Queenstown, or Falmouth, at the option of the master, for orders whether to discharge at a good and safe port in the United Kingdom or on the Continent between Havre and Hamburg, both ports inclusive, or so near thereunto as she might safely get, and deliver the same in any dock freighters might appoint agreeably to bills of lading, on being paid freight as therein mentioned, the master to sign bills of lading at any current rate of freight required without prejudice to such charterparty, but not under chartered rate.

2. Pursuant to the said charterparty the said ship proceeded to Rangoon, and there loaded a cargo of rice in bags, for which the master of the said vessel signed and delivered a bill of lading, which, so far as material, was and is in the words and figures following, that is to say:—

"Shipped in good order and well conditioned, by Gladstone, Wyllie, & Co., in and upon the good ship or vessel called the *Pieve Superiore*, whereof is master for this present voyage Consigliere, and now riding at anchor in the Rangoon River, and bound for Belle Isle, Scilly, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom or on the Continent between Havre and Hamburg, both inclusive, 5000 bags rice, each 210 lbs. net, 5300 bags, each 198 lbs. net, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of , as ordered (all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted), unto order or to its assigns, he or they paying freight for the said goods at the rate of 3*l.* 15*s.* (three pounds fifteen shillings sterling per ton of 20 cwt. net weight), delivered with average accustomed. In witness whereof, the master or purser of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

"Dated in Rangoon, this 26th day of March, 1873.

"F. Consigliere."

3. The vessel sailed with the said cargo from Rangoon, and her master, in the exercise of his option, proceeded therewith to the port of Falmouth for orders, and there received orders from the plaintiffs or their agents to proceed with the cargo to Bremen, which is a port on the Continent between Havre and Hamburg, and to discharge the cargo at Bremen.

4. The master accordingly sailed from Falmouth in the vessel with the cargo to Bremen, and there delivered the cargo.

5. The vessel, after having discharged her cargo of rice at Bremen, left Bremen on a new voyage for Cardiff to load coals there, and subsequently arrived at Cardiff, where she has been arrested by the plaintiffs in this suit.

6. The plaintiffs allege themselves to be assignees for valuable consideration of the said bill of lading, and allege that the said cargo of rice suffered damage in the said vessel, and they have instituted this suit as such assignees for the recovery of losses which they allege themselves to have sustained by negligence or misconduct, or by breach of duty or breach of contract on the part of the master or crew of the said vessel.

7. Save as aforesaid, the said cargo of rice was never brought into any port in England or Wales.

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'8. The defendant submits that the said cargo of rice was not carried into any port in England or Wales within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861, and that by reason thereof this honourable Court has not jurisdiction to entertain this suit.

The plaintiffs thereupon gave notice that they should move the judge in court to reject the admission of the petition on protest by reason that under the circumstances therein stated the Court had jurisdiction to entertain the cause.

Dec. 9. *Butt, Q.C.*, and *Cohen*, on behalf of the plaintiffs, moved pursuant to the above notice of motion.

Milward, Q.C., and *E. C. Clarkson*, for the defendants, in opposition to the motion and in support of the protest.

The following authorities were cited in the course of the arguments: *The Bahia* (1); *The Teutonia* (2); *The Patria* (3); *The Ironsides* (4); *The Two Ellens* (5); *The Kasan* (6); *The Danzig*. (7)

Cur adv. vult.

Dec. 18. SIR ROBERT PHILLIMORE. This is a motion to reject a petition on protest. A suit was instituted for damage to cargo on behalf of certain consignees against the vessel *Pieve Superiore*, whose owner is a foreigner.

He has appeared under protest and set forth his defence in the petition. The petition states that the ship was chartered in March and April, 1872, to take an outward cargo from Europe to a port in the East Indies, "and there to load a cargo of rice, to proceed therewith to Belle Isle, Scilly, Queenstown, or Falmouth, at the option of the master, for orders whether to discharge at a good and safe port in the United Kingdom or on the Continent between Havre and Hamburg."

The ship proceeded to Rangoon and loaded the cargo, and the master signed and delivered a bill of lading to Gladstone, Wyllie, & Co., in which the vessel is described to be bound for the places mentioned in the charterparty. The bill of lading and charterparty are in English, and the freight is to be paid in English

(1) Br. & Lush. 61.
(2) Law Rep. 3 A. & E. 394.
(3) Law Rep. 3 A. & E. 436.
(4) Lush. 458; 31 L. J. (P. M. & A.) 129.
(5) Law Rep. 4 P. C. 161.
(6) Br. & Lush. 1.
(7) Br. & Lush. 102; 32 L. J. (P. M. & A.) 164.

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money. The vessel sailed from Rangoon to Falmouth, and there received orders to go to Bremen, which is between Havre and Hamburg, and there discharged her cargo. She sailed from thence to Cardiff on a new voyage, and was then arrested in this suit.

The contention on behalf of the protestors, which was very ably conducted, proceeded upon two grounds. The first and principal ground was that the words in the statute 24 Vict. c. 10, s. 6, "any goods carried into any port in England or Wales in any ship" must mean carried into for the purpose of delivery in that port. The second ground, which was, I think, more reluctantly put forward, was that the goods must, at all events, be carried into a port which from circumstances became the final port, or, according to a different form of the same proposition, that the goods must be carried into a port, in which port a wrong was done to the shipper. It is proper to observe here, that the petition on protest does not allege that whatever damage was done happened after the vessel had left the English port and was on her way to Bremen. It is obvious that the second proposition of the counsel for the protest cannot be reconciled with the first, inasmuch as the second admits that circumstances may happen which found the jurisdiction, although the goods are not carried into the port of discharge mentioned in the charterparty or bill of lading.

Various cases have been decided by my immediate predecessor upon this point, and one by myself; and in the arguments addressed to the Court upon former occasions, as on the present, the principal topic has been the inconvenience which would result from the plain and literal construction of the words of the statute, which it cannot be denied primâ facie are in favour of the jurisdiction of the Court. And I must here remark that the large and descriptive words are not narrowed or restricted by any subsequent proviso, though it seems that when a restriction was intended to be imposed, as in the case of the domicil of the defendant, it was plainly expressed. If the words are plain and unambiguous, I do not think myself at liberty to consider the argument from inconvenience, although it is very possible that a full investigation into this topic would show that the inconveniences are balanced by contrary advantages.

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In *The Bahia* (1) the ship carrying the cargo was bound for Dunkirk. She put into the port of Ramsgate, and the master then refused to proceed to Dunkirk, or to give delivery at Ramsgate, and the Court held that it had jurisdiction. In *The Patria* (2) I referred to this case, and on its authority decided one portion of the case then before me, and from that judgment there has been no appeal. In *The Patria* (2) the vessel was bound for a port in Germany, and put into Falmouth from accidental circumstances. The master refused to proceed further on the ground of danger of capture by French cruisers. I held that the jurisdiction of the Court was founded under the statute.

It is true that in both these cases the ship had not left the English port in which she was arrested. In the present case she has deposited her cargo, alleged to have been damaged in the foreign port, and is seized on her return with a new cargo to this country. But it is to be observed that it is not averred in this case that the shipper has had recourse to the tribunals of Bremen. If he has, as he alleges, sustained an injury for which the owner of the ship is liable, it is still unredressed; and I have already observed upon the pervading English character of the transaction. It becomes unnecessary to refer to the other German cases arising out of the recent war.

It appears to me that the principle of these decisions must govern my judgment in the present case, more especially as the vessel in this case had come into an English port in compliance with the terms of the charterparty, and that there was thereby a partial fulfilment of the contract, and the order which she received there might have been to discharge in an English port, and perhaps in that particular port.

Upon the whole, having regard to the particular circumstances which I have stated, and being unable to distinguish this case in principle from those which have been already determined on this point, I see no adequate reason for not following the plain words of the statute, and I must overrule the protest, and direct the party to appear absolutely, with costs.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitor for defendant under protest: *Cooper.*

(1) Br. & Lush. 61. (2) Law Rep. 3 A. & E. 436.

THE OWEN WALLIS. (6370.)

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Jan. 23.

Collision—Dumb Barge not bound to carry a Light in the Thames at Night.

A screw steamship had just come out of the Regent's Canal Dock in the river Thames, about 2 a.m. on a December morning, when she came into collision with a dumb barge which was drifting up the river with the flood tide, and without having any light exhibited:—

Held, that the steamship might, under the circumstances, have kept out of the way of the barge, and that she ought to have done so, and that she was alone to blame for the collision.

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THIS was a cause of collision instituted on behalf of the owners of the barge *Lord Clarendon*, and of the cargo lately laden therein, against the screw steamship *Owen Wallis*.

The petition stated in substance that—

At about 2 a.m. on the 29th day of December, 1871, the *Lord Clarendon*, a dumb barge of 60 tons burden, laden with cargo, was proceeding up the river Thames in charge of a licensed waterman and an apprentice, and was off the entrance to the Regent's Canal.

The morning was fine and moonlight, and the tide was about half flood and of the force of about four knots per hour, and the *Lord Clarendon* was driving up the river with one oar out to keep her with her head up the river, and was over towards the south side of the river.

At such time the *Owen Wallis*, which was under steam, came out of the entrance to the Regent's Canal, and instead of keeping clear of the *Lord Clarendon*, as she ought to have done, ran against and with her stem struck the *Lord Clarendon* on her starboard side.

The *Owen Wallis* improperly neglected to take proper measures for keeping clear of the *Lord Clarendon*.

The said collision was occasioned by the negligence of those on board the *Owen Wallis*.

The answer on behalf of the owners of the *Owen Wallis* stated in substance as follows:—

At about 2 a.m. of the 29th of December, 1871, the screw steamship *Owen Wallis* of 559 tons register or thereabouts, propelled by engines of 95 horse-power and manned by a crew of twenty hands, left the Regent's Canal Dock, in the port of London, in charge of Henry George Row, a licensed waterman, in water ballast, bound on a voyage to Newcastle-on-Tyne.

Shortly before 2.15 a.m. of the said morning the weather was fine and clear, the tide was flood, and of the force of between three and four knots an hour, and the *Owen Wallis* was on the north side of the river Thames opposite the entrance of the said Regent's Canal Dock, and had her head down the river, her engines just beginning to work slowly ahead, and the Admiralty regulation lamps duly exhibited, and a good look-out being kept on board her.

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In this state of circumstances, and when the *Owen Wallis* had only been moved a few feet on her course down the river, the *Lord Clarendon* was made out ahead of the *Owen Wallis*, at the distance of about 200 feet, driving up athwart the tide and inside of the canal buoy, and thereupon the engines of the *Owen Wallis* were stopped and reversed full speed, but the starboard side of the barge came in contact with the stem of the *Owen Wallis*.

The barge had no light exhibited, and made no signal to warn vessels of her approach, and was not being navigated in a careful and proper manner, or in a proper part of the channel, and those on board her neglected to use proper means to prevent her drifting against the *Owen Wallis*.

The said collision and the damages and losses consequent thereon are attributable to the negligence and improper conduct of those on board the *Lord Clarendon*.

Jan. 23. The case came on for hearing.

The result of the evidence appears from the judgment.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs. No blame for the collision can be attributed to the *Lord Clarendon* for the course she took in coming up the river. She had a right to be where she was, whether it was near the north shore or in mid-channel: *The Velocity* (1); *The Cologne*. (2) There is no regulation or bye-law requiring a dumb barge to carry a light, and the "Regulations for preventing Collisions at Sea" require that the lights specified therein, "and no others," shall be carried.

Herschell, Q.C., and *G. Bruce*, for the defendants. The *Lord Clarendon* was to blame for not having kept out of danger, and in the fairway of the river. Those on board the steamer had a right to expect that barges would not be navigated so as to obstruct the movements of vessels leaving dock. The *Owen Wallis* was in such a position that it was not possible for her to manœuvre so as to keep clear of the barge, and, moreover, the barge was in fault for having no light. In the absence of any express law, common prudence requires that for the purpose of avoiding impending danger lights should be exhibited by all craft when navigating a thoroughfare at night: *The John Fenwick* (3); *The Industrie*. (4)

SIR ROBERT PHILLIMORE. This is a case of collision which took place between a dumb barge and a screw steamer of 559 tons on the 29th of December, 1871. There is in all these cases extreme difficulty in ascertaining facts, even when a case is heard and

(1) Law Rep. 3 P. C. 44.
(2) Law Rep. 4 P. C. 519.
(3) Law Rep. 3 A. & E. 500.
(4) Law Rep. 3 A. & E. 303.

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decided recentissimo facto, but the difficulty is greatly increased when, as in the present case, such a length of time has elapsed between the collision and the hearing. The excuse for the delay given is that the parties were trying to come to some arrangement.

In the early morning the barge was going up the Thames, in charge of a licensed waterman, on the flood tide. Unfortunately the waterman who had charge of the barge is since dead. When the barge got near the entrance to the Regent's Canal, about 2 a.m., the *Owen Wallis*, a steamer which was in charge of a licensed waterman, was coming stern foremost out of the dock entrance. The barge was sweeping up on the flood tide broadside on. The *Owen Wallis*, according to her own statement, sighted the barge about 200 feet away and ahead.

Two questions have been raised: first, whether the barge was to blame, assuming she was not in mid-channel, but to the north of it, for not keeping further out into the river, and so out of the way of the steamer; secondly, whether the barge was to blame for not carrying a light. Now I cannot hold, as a matter of law, that the barge would not have been in the right in coming up to the north of mid-channel. It may be desirable that some uniform rule should be established, but it has been laid down in recent decisions that vessels may navigate on either side of the river. As a matter of fact, I am not satisfied upon the evidence before me that the barge was coming up to the north of mid-channel.

It is further said that the barge is to blame because she carried no light. But there is no regulation requiring dumb barges to carry any light, and there is a great difficulty in imposing a duty beyond the letter of the regulations. What light ought a dumb barge to carry? The ordinary lights would tend to mislead, and no provision has been made authorizing a dumb barge to carry any special light. I cannot, therefore, hold that the barge was to blame for not having carried a light.

There is no duty imposed by statute upon a barge to get out of the way of a steamer; nor do I consider there was any such duty imposed upon the *Lord Clarendon* in the special circumstances of the case. On the contrary, it was the duty of the steamer to get out of the way of the barge.

The result of the evidence is that it was a morning when vessels could be seen at a fair distance, and I think the steamer

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ought to have made out the barge in time to have taken measures to avoid her. In fact, no report was made at all of the barge by the look-out, and the pilot, on going on to the bridge, saw the barge at a distance of fifty or sixty yards only. The pilot had been aft while the ship was coming out of dock, and came on to the bridge only just before the collision. I must therefore hold that the evidence establishes that, if there had been a good look-out, and the barge had been reported in sufficient time, the steamer might have gone astern, and so have avoided the collision. I think it right to say that the Elder Brethren have suggested possible difficulties as to the steamer avoiding the barge; but as the evidence does not establish that such difficulties actually existed, I must decide, on my own responsibility, that the *Owen Wallis* is alone to blame for the collision.

Solicitors for plaintiffs: *Plews & Irvine.*
Solicitor for defendants: *Cooper.*

March 4.

THE C. S. BUTLER (6672).
THE BALTIC (6728).

Damage—Salvage—Right of salved Vessel to recover Damage caused by negligent Navigation of salving Vessel in rendering Assistance—Right to Salvage Remuneration not forfeited.

A screw steamer fell in with a disabled barque in the English Channel, and in answer to signals of distress approached her to render assistance. In rendering salvage services to the barque damage was caused to that vessel by the negligent navigation of the screw steamer, the two vessels coming into collision on three occasions. To recover for the damages sustained in these collisions, the owners of the barque promoted a cause of damage against the steamer, and subsequently an action for the recovery of salvage remuneration was brought by the owners of the steamer against the barque. On the two causes coming on to be heard together, the Court *held*, that the owners of the barque were entitled to recover in the damage cause, and that the owners of the steamer were entitled to recover in the salvage cause.

A CAUSE of damage was instituted on behalf of the owners of the barque *Baltic* against the steamship *C. S. Butler*. The petition alleged, inter alia, as follows:—

1. Between 5 p.m. and 6 p.m. on the 27th day of October, 1873, the barque *Baltic*, of 458 tons register, laden with a cargo of deals, and bound from New

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Brunswick to Hull, and carrying a crew of eleven hands, was off Beachy Head in the English Channel.

2. The *Baltic* during the previous night had lost her jibboom and foreyard, and had suffered other damage by collision, and was at such time proceeding down channel on the starboard tack with a view to getting into port to repair damages; she had a signal for a pilot flying.

3. At such time the above-named screw steamship *C. S. Butler*, which was steaming up channel, turned to the northward and came round under the stern of the *Baltic* and on to her starboard quarter, and after some hailing between the two vessels the *C. S. Butler* again passed the stern of the *Baltic* and came on to her port side.

4. The mate and afterwards the master of the *C. S. Butler* boarded the *Baltic* by means of the *C. S. Butler's* boat, and after a good deal of bargaining an arrangement was made for the *C. S. Butler* to take the *Baltic* in tow. It was then between 7 p.m. and 8 p.m., the weather was fine and clear, the wind was light from about north to north-north-east, and the *Baltic* was close-hauled on the starboard tack, making about two knots an hour. The *Baltic* had her proper regulation green light duly exhibited and burning brightly. Her red lamp had been carried away, and by arrangement with or at the suggestion of the master of the *C. S. Butler* a globe lantern covered with red bunting was exhibited and burning in the port fore-rigging of the *Baltic*.

5. The towrope of the *Baltic* was got ready, and her mainyard was laid aback, and the boat of the steamer, having put the master and mate of the *C. S. Butler* on board their vessel, came back to the *Baltic* and lay alongside her on her port side, and those in the boat proceeded to coil in her the hauling line of the *Baltic*.

6. Whilst this was being done the *C. S. Butler*, instead of keeping clear of the *Baltic*, as she could and ought to have done, ran against and with her starboard quarter struck the *Baltic* on her port quarter, doing her some damage.

7. The *C. S. Butler* then steamed ahead, and turned round and ran against and with her stem struck the *Baltic* a violent blow on her port bow, and did her so much damage that she filled with water in a very few minutes, and was only saved from sinking by her cargo of deals.

8. The *C. S. Butler* subsequently took the *Baltic* in tow, and proceeded with her towards the Downs, but the master of the *Baltic*, not thinking it prudent to proceed to the Downs, arranged with the master of the *C. S. Butler* to tow the *Baltic* to Cowes. On the following day the two vessels, on their way to Cowes, were just inside the Isle of Wight, and the *C. S. Butler* was towing ahead of the *Baltic* with two hawsers fast to her, when one of such hawsers parted. The *C. S. Butler* backed astern with a view to the remaining hawser being shortened in, but in consequence of the want of care and skill of those on board her she ran against the bowsprit of the *Baltic* and broke it, and did further damage to the *Baltic*. The *C. S. Butler* subsequently towed the *Baltic* to Cowes.

9. The said collisions between the *C. S. Butler* and the *Baltic*, and the damages and losses consequent thereon, were occasioned by the negligence or want of skill of the master or crew of the *C. S. Butler*.

The defendants by their answer alleged in substance as follows:—

1. Shortly before 6 p.m. of the 27th of October, 1873, the screw steamship

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C. S. Butler, of the burthen of 516 tons net register, propelled by engines of eighty horse-power, and navigated by William Dodds, her master, and a crew of sixteen hands, was about ten miles distant from the Owers Light Vessel, which bore about north-north-west, proceeding in the prosecution of a voyage from Southampton to Shields in water ballast.

3. Whilst the *C. S. Butler* was so proceeding a flash-light was seen on board a vessel on the port bow, and the same being waved about, it was believed on board the *C. S. Butler* to be a signal from some vessel requiring assistance. The *C. S. Butler* then proceeded towards such vessel and found her to be the *Baltic*.

The answer, after stating that the *C. S. Butler* proceeded to the *Baltic*, and that it was ultimately agreed between the masters of the two vessels that the *C. S. Butler* should tow the *Baltic* to the Downs for 112*l.* 10*s.*, continued as follows:—

7. The engines of the *C. S. Butler* were then set on slowly ahead, and she proceeded on to the port side of the *Baltic*, and the boat of the *C. S. Butler* proceeded with lines to the *Baltic* to be made fast to the hawser of that vessel. The lines were made fast, and the *C. S. Butler* then lay stopped and her crew commenced hauling in the towline of the *Baltic*; owing to the line having been improperly secured to the hawser the same slipped off just as it was being got to the taffrail of the *C. S. Butler*. The hawser then had to be hauled in on board the *Baltic*, and whilst this was being done the *C. S. Butler* was steamed slowly round the *Baltic* and back again to her port quarter for the purpose of again getting her hawser.

8. By this time the night had got very dark, and as the *C. S. Butler* passed under the stern of the *Baltic* the mizen-boom of the *Baltic*, which was adrift, came in contact with the starboard bulwark of the *C. S. Butler*. After the *C. S. Butler* had steamed round the *Baltic* her engines were stopped about 100 feet off the *Baltic* on her port side; the boat then went with the lines again to the *Baltic*, and to keep the *C. S. Butler* in position her engines had to be put on ahead and astern slowly. The *Baltic* now and again burned the flash-light. Whilst the *C. S. Butler* was thus attempting to get the rope of the *Baltic* the *Baltic* fell off from the wind a little and the stem and starboard bow of the *C. S. Butler* struck the port bow of the *Baltic*; the blow was so light that the effect of it was not felt, and the vessels cleared almost immediately. The rope was then got on board the *C. S. Butler* and secured to her samson post, and she proceeded to tow the *Baltic* for the Downs.

9. After the *C. S. Butler* had been towing about half an hour, the master of the *Baltic* hailed to the *C. S. Butler*, and wished to be towed to Cowes. The course was accordingly changed for Cowes, and both vessels proceeded on such course for about a quarter of an hour, and then the rope parted. The *C. S. Butler*, after making unsuccessful efforts to get the rope again made fast, went under the stern of the *Baltic*, and her master told those on board the *Baltic* that he would lay by the *Baltic* all night, and he did so. During the night some of the crew of the *Baltic* came on board the *C. S. Butler* and refused to return to their vessel.

10. At daylight on the following morning the master of the *C. S. Butler*

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boarded the *Baltic*, and the master of the *Baltic* then said that as the distance to Cowes was shorter than to the Downs, that he, the master of the *C. S. Butler*, ought to accept 50*l.* for the towage of the *Baltic*; this offer was declined, but the sum of 100*l.* was subsequently agreed upon between the two masters, and a written memorandum of agreement to that effect was made out by the master of the *Baltic* in pencil.

11. A towrope belonging to the *C. S. Butler* and a small warp belonging to the *Baltic* were then made fast on board the *Baltic*, and at 8 a.m. the *C. S. Butler* commenced towing the *Baltic* again, and continued to do so for about four hours. When the two vessels were abreast of Spithead the pilot on board the *Baltic* ordered the towropes to be shortened, and the engines of the *C. S. Butler* were accordingly stopped and the ropes hauled in and shortened and then made fast, and in commencing to tow the *Baltic* again the two vessels came into collision, the bowsprit of the *Baltic* coming into contact with the starboard side of the bridge of the *C. S. Butler*.

12. The *C. S. Butler* afterwards towed the *Baltic* in safety, and arrived in Cowes Roads at about 4 p.m., where the *Baltic* came to anchor.

13. Neither the regulation starboard side light nor the globe light mentioned in the 4th paragraph of the petition were exhibited on board the *Baltic* until after the collision in the 7th paragraph of the petition mentioned.

14. The flash-light shown from time to time on board the *Baltic* during the time the *C. S. Butler* was endeavouring to get the towropes made fast dazzled the sight of those on board the *C. S. Butler*, and greatly embarrassed them in the management of their vessel.

15. The defendants deny that the collisions in the petition mentioned were occasioned by any negligence or want of skill on the part of the master or crew of the *C. S. Butler*.

16. The said alleged collisions are attributable to the unmanageable condition of the *Baltic* and to the difficult nature of the services the *C. S. Butler* was called upon to render.

17. The said alleged collisions, so far as concerns the *C. S. Butler*, resulted from inevitable accident. The said alleged collisions took place under circumstances which absolve the *C. S. Butler* from all blame in respect thereof.

18. The defendants deny the several allegations in the petition, save as appears by this answer.

A salvage suit having been instituted in the county court of Hampshire on behalf of the owners, master, and crew of the *C. S. Butler* against the *Baltic*, her cargo and freight, the same was transferred to this court, and an agreement was made by the solicitors acting respectively for the plaintiffs and defendants that the salvage cause should be heard without pleadings at the same time as the damage cause.

The causes came on to be heard together. The material facts sufficiently appear from the pleadings and the judgment.

Butt, Q.C., and *E. C. Clarkson*, for the *Baltic*. The collisions

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were occasioned by the gross negligence of those in charge of the *C. S. Butler*. Where a vessel voluntarily undertakes to render a salvage service she is liable for the consequences arising from the negligent performance of the duty she has undertaken: *The Thetis*. (1) As to the claim for salvage, the *C. S. Butler* has, by her negligent conduct, forfeited all claim to salvage remuneration.

Milward, Q.C., and *R. E. Webster*, for the *C. S. Butler*. The injuries arising from the collisions were contingencies naturally arising from the difficult nature of the service which the *Baltic* requested the *C. S. Butler*. to render. The *Baltic* must be taken to have accepted the help of the *C. S. Butler* subject to the risks necessarily incident to the service. But whatever may be the result of the damage suit, it is clear that a salvage service has been rendered for which the *C. S. Butler* is entitled to the sum agreed to be paid.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. On the night of the 26th of October a barque, called the *Baltic*, of 458 tons register, and, as it fortunately turned out, laden with a cargo of deals, suffered damage by collision with two sailing vessels, which left her without rendering any assistance or revealing their names. On the next evening after receiving this damage she was off Beachy Head, and about six or seven o'clock she made signals of distress to the screw steamship *C. S. Butler*, which was steaming up channel. There is no doubt that the *Baltic* had received considerable damage, and was in need of assistance, but at the same time it must be remembered that she was in no danger of sinking. In answer to her signals the *C. S. Butler* came to her assistance, but in rendering assistance came into collision with her three separate times, and did her much damage.

The question I have had to take the opinion of the Elder Brethren on is this—whether the damage on all these occasions, but especially on the second, when the material damage was done, can fairly be excused on the ground of accidental mishap, having regard to the size of the vessel and other circumstances,

(1) Law Rep. 2 A. & E. 365.

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or whether it shews crassa negligentia, as we are in the habit of saying—gross want of proper navigation, which certainly would, in my judgment, render her liable for the damage that she thus caused, notwithstanding that she was acting as a salvor.

Having regard to the state of the weather, and to the fact that the *C. S. Butler* was a screw-steamer, with full power to take whatever course was most expedient, the Elder Brethren are of opinion —and in this opinion I concur—that this is a case of negligence of that gross kind which entitles the salved to redress and reparation; that the *C. S. Butler* ought to have brought herself parallel instead of going nearly stem on as she did on the occasion of the second collision; and also that the other collisions, though slight in their effect, are not to be justified on the principles which I have laid down. I then asked the Elder Brethren whether it was a fair suggestion to make that the burning of the flare on board the *Baltic* had any effect in bringing about the collision; and with respect to this the Elder Brethren are of opinion that the flare shewn by the *Baltic* in no way excused the collisions in this case. That suggestion appears to have been an afterthought on the part of the *C. S. Butler* to furnish some excuse for a very gross piece of clumsy navigation.

In the result the conclusion the Court has arrived at is that in the case of collision the *Baltic* must recover against the *C. S. Butler* such damages as may be assessed in the usual way by the registrar, assisted by merchants; and with regard to the salvage case, I am of opinion that it would be a very harsh and unjustifiable proceeding to pronounce that the *C. S. Butler* should forfeit her claim to salvage remuneration. I award the amount agreed upon, namely, 100*l.* Costs in the first case must be given against the *C. S. Butler;* the costs in the second case must be given against the *Baltic.*

Solicitors for the owners of the *Baltic: Stokes, Saunders, & Stokes.*

Solicitor for the owners of the *C. S. Butler: Cooper.*

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April 27.

THE CAIRO. (6687.)

Life Salvage—Persons belonging to Ship in Distress—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 458.

A steam-vessel incurred serious damage by a collision, and her master ordered her boats to be got out. Some of her crew, without leave from the master, got into one of the boats and rowed away. The boat's crew were afterwards picked up at sea, and rescued from a position of danger, by a smack. In a salvage suit instituted on behalf of the owners and crew of the smack against the steamship:—

Held, that the plaintiffs were entitled to recover, in such suit, salvage for the service they had rendered.

The *Cairo*, a steamship, came into collision with another steamship near the *Newarp* lightship, on the evening of the 5th of December, 1873. She sustained severe damage, and her master ordered her boats to be got out. Ten of her crew got into one of the boats, and, without any order from the master, rowed off in the direction of the *Newarp* lightship. The boat was insufficiently supplied with oars, and the tide and wind prevented it making much way towards the lightship. The boat was picked up by a fishing smack called the *Emerald*, and the boat's crew were carried in safety by the smack into Yarmouth. The owners, master, and crew of the *Emerald* instituted a cause of salvage against the *Cairo*, and alleged in their petition that they had saved the boat's crew from a position of serious danger.

The defendants, the owners of the *Cairo*, by their answer pleaded, inter alia:—

When the boat's crew left the *Cairo* she was in no danger, and there was no reason for leaving her; and the said boat's crew left without the master's orders and against his consent, and most improperly.

They submit that in the circumstances no salvage services were rendered by the plaintiffs for which the defendants are liable, or which they ought to be ordered to remunerate.

The case came on for hearing, and witnesses were examined before the Court. The result of the evidence appears from the judgment.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *G. Bruce*, for the plaintiffs, contended that the services were rendered by the plaintiffs "in saving the lives of persons belonging to" the *Cairo*

within the meaning of the 458th section of the Merchant Shipping Act, 1854. [They cited *The Willem III.* (1)]

Butt, Q.C., and *W. G. F. Phillimore*, for the defendants. The services are too insignificant to merit reward. Even if life salvage is due, the salvage is not such as the *Cairo* can be rendered liable for; the men in the boat left the vessel without the leave of the master.

The Admiralty Advocate, in reply.

SIR ROBERT PHILLIMORE. In this case the *Emerald*, a fishing smack of 55 tons register, belonging to the port of London, and navigated by eleven hands, having put into Harwich and delivered there a cargo of fish, sailed from that port on the morning of the 5th of December in last year. On the night of that day she was in the fishing ground off Cromer, and those on board her saw two steam-vessels in collision, and heard cries, and shortly afterwards, after sailing about for twenty minutes, they made out a boat with several men in her, pulling only two oars, and calling out for assistance. The men in the boat were foreigners, and unable to understand the directions given them by the master of the *Emerald*. The men in the boat, ten in number, were taken on board the *Emerald*; and the Court is now asked by the owners, master, and crew of that vessel to award salvage remuneration to them on the ground that, under the 458th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), a salvage service has been rendered by them in saving the lives of the crew of the boat from imminent danger.

The action has been brought against the steamship *Cairo*, to which the men belonged, and which has been proved to have been one of the two vessels seen from the *Emerald* to have been in collision as before mentioned. The defence raised by the owners of the *Cairo* is twofold. It is first alleged that the lives of the men picked up by the *Emerald* were in no danger; secondly, that if their lives were, in the circumstances, in any danger, the men had improperly left their ship, and therefore the ship ought not to be made responsible in respect of the services rendered to them.

The facts of the case lie in a very small compass. I must

(1) Law Rep. 3 A. & E. 487.

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remember what were the circumstances—the time of year—the time of night—the fact that the men taken on board were foreigners, ignorant of the locality, ignorant also of the English language. I must also remember the state of the weather. At the time the men left the *Cairo* the weather was fine; but it changed and the sea became rough not long after the men had been received on board the *Emerald*, so that in all probability, if they had remained at sea in the boat, they would have been lost. At the same time it must certainly not be forgotten that, although when the men were taken on board it was moonlight, there was some haze on the water, and the boat, when discovered, was in the track of vessels and in danger of being run down. In all the circumstances, I am of opinion that these men were saved from danger of loss of life by the assistance rendered by the *Emerald*, and that if no other objection can be shewn to exist, the plaintiffs are entitled to recover salvage.

The question of law raised by the defendants is of a grave kind, and I should be sorry by any words of mine to countenance the idea that the section of the Merchant Shipping Act, 1854, to which I have referred could be so strained as to compel the Court to hold a ship liable for salvage because some of her crew had deserted her without reason and contrary to orders, and had afterwards found themselves in a condition of danger, from which they had been rescued. Whether a vessel is or is not liable for life salvage is a question which only can be answered by considering the circumstances of each case. In this case, no doubt, the *Cairo* herself had suffered serious damage, and was in great danger; and shortly afterwards she accepted the services of another set of salvors, who assisted to beach her. It must be remembered that before the men left their vessel the boats had been ordered out. There is, moreover, the fact that the captain of the *Cairo*, who has given his evidence, does not state that the men left the vessel contrary to his orders; but he does state that two days afterwards they went back on board his vessel, and that he, without making any remonstrance, allowed them to return to their duty. Certainly it would not be to the interests of navigation or commerce if the Court were to put a narrow construction on a statute passed for the encouragement of efforts to save human life.

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On the whole, taking into consideration the special circumstances of the case, I am of opinion that the ship must he held liable to be condemned in salvage on the ground that the lives of the men belonging to her were saved from danger by the services rendered by the plaintiffs in this case. At the same time, the sum I have to award as salvage remuneration, bearing in mind the facts, must be moderate. Considering that it has been proved that the *Emerald* lost two days' fishing, which involved a loss of 40*l.*, I think that I shall not be wrong in awarding the sum of 14*0l.* to the salvors, with costs.

Solicitors for plaintiffs: *Keen & Rogers.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

THE SCHWAN. (6500.)

May 5.

Costs—Compulsory Pilotage.

The defendants in a collision suit, by their answer, denied that their vessel was to blame, and also set up the defence of compulsory pilotage. The Court decided that their vessel was to blame, but dismissed the suit upon the ground that the defence of compulsory pilotage was established:—

Held, that the plaintiff was not entitled to any portion of the costs of the suit.

3 Asp. Cas. 949.

THIS was a cause of damage instituted on behalf of the owners of the barque *Robert Morrison* against the screw steamship *Schwan*. In answer to the petition, the defendants, the owners of the *Schwan*, after setting out a statement of the manner in which they alleged the collision to have occurred, denied, save as appeared by the answer, the truth of the several allegations contained in the petition, and charged that the collision was occasioned by the improper navigation of the *Robert Morrison*. The two last articles of the answer were as follows:—

The said collision was not occasioned by any neglect on the part of any of those on board the *Schwan*.

Before and at the time of the said collision the *Schwan* was navigating within a district and under circumstances in which it was compulsory upon her and her master and owners that she should have on board and be in charge of a duly licensed pilot for such district, and before and at the time of the said collision the *Schwan* was in charge of and being navigated by and under the

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direction of a pilot duly licensed for such district, and all the orders of such pilot were duly obeyed by the master and crew of the *Schwan*; and if the said collision was in any way occasioned by any improper navigation of the *Schwan*, it was solely occasioned by some neglect or default on the part of the said pilot, and not in any way by the master or crew of the *Schwan*.

The plaintiffs, in their reply, denied the several allegations in the answer, save as appeared by the petition. A cross cause was instituted against the *Robert Morrison* on behalf of the owners of the *Schwan*.

May 1. The two causes came on to be heard together, when the Court pronounced the *Schwan* alone to blame, but found the defence of compulsory pilotage proved, and accordingly dismissed both suits; but, as a question was raised as to the costs of the principal suit, the Court directed the matter to be argued on a future day.

May 5. *Milward, Q.C.*, and *G. Bruce*, on behalf of the owners of the *Robert Morrison*, applied to the Court to condemn the owners of the *Schwan* in all the costs, except such costs as were incident to the issue raised in the principal cause by the defence of compulsory pilotage: *The Admiral Boxer* (1); *The Batavier* (2); *The Royal Charter* (3). The defendants have raised two defences, and they have only succeeded upon one; and it is reasonable that they should pay the costs incurred in respect of the issue upon which they have failed. The rule that the costs shall follow the finding upon each issue is not only universal at common law (Common Law Procedure Act, s. 81), but has been acted upon in some instances in this court: *The Laurel*. (4) Had the defendants chosen to admit that their vessel was to blame, and to raise the defence of compulsory pilotage only, possibly the case would not have been brought into court; at all events, the costs of the hearing would have been greatly diminished. If the Court refuses to apportion the costs of the issues there will be great hardship, because in the cross action only nominal costs have been incurred, in consequence of the two actions having been tried together. It is a mere accident that the cross action is not the principal cause; and if the cross action had been the principal

(1) Sw. Adm. 193.

(2) 4 No. of Ca. 356.

(3) Law Rep. 2 A. & E. 362.

(4) Br. & Lush. 191; 33 L. J. (P. M. & A.) 17.

cause, the owners of the *Robert Morrison* would have recovered the substantial costs of the hearing.

Butt, Q.C., and *E. C. Clarkson*, for the owners of the *Schwan*. The analogy sought to be derived from the common law rule does not hold good, because the single issue raised by the plea of not guilty would enable the defendants to raise both the defences set up in this case. Moreover, as a matter of fact, it is necessary to go into all the circumstances of the case in order to establish the defence of compulsory pilotage; and if that defence alone were raised, little or no cost would be saved. It would be practically impossible to separate the evidence necessary to support either branch of the defence. The uniform practice of the Court is against the contention of the plaintiffs, and the most serious inconvenience will arise if the established rules of the Court are unsettled: *The Annapolis.* (1)

Milward, Q.C., in reply.

SIR ROBERT PHILLIMORE. In this case the defendants, by their answer, denied that there was any neglect on the part of any of those on board their vessel, and further pleaded that if the collision was in any way occasioned by any improper navigation of the *Schwan*, it was occasioned by the default of the pilot in charge, who was employed by compulsion of law. The plaintiffs have succeeded in proving that the collision was occasioned solely by the improper navigation of the defendants' vessel, and the defendants have succeeded in substantiating the defence that the collision was caused by the default of the pilot.

It has been contended before me to-day, on behalf of the plaintiffs, that the defendants ought to pay the costs incurred in determining the question which vessel was to blame, because they have failed upon that part of the case. It was admitted, and indeed could not be denied, that the practice of the Court ran counter to this contention. Where, indeed, a defendant admits upon the pleadings that his vessel is to blame, and sets up the defence of compulsory pilotage alone, the cases establish that he is entitled to his costs if he succeeds; and indeed it could hardly be otherwise, because in such a case the defendant

(1) Lush. 295, 312; 30 L. J. (P. M. & A.) 201.

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not only succeeds in the suit, but succeeds upon the only issue he has raised. But no single case has been cited in which a defendant in a damage suit, who has raised a double defence and succeeded upon the defence of compulsory pilotage alone, had been ordered to pay any portion of the costs of the suit.

It has been said that the common law rule by which the costs of issues are apportioned lays down a principle which this Court should adopt, but I think the Court ought not lightly to depart from its own established practice. This Court does not always follow the rules of practice laid down by the common law Courts. In damage cases, where the collision is caused by inevitable accident, and where both vessels are to blame, this Court acts upon well-established rules of its own, which are different from those recognised at common law. My learned predecessor, Dr. Lushington, who had very extensive experience, reaching a long way back, and who was peculiarly cognisant of all the authorities, expressed an opinion that a defendant in a damage suit, who succeeded in establishing the defence of compulsory pilotage, never was condemned in costs. It would require very clear and decisive proof that this practice is productive of evil before it should be altered by the Court. But I cannot see that any such evil exists; on the contrary, I think that to alter the practice in the way suggested might be to cast upon the officer whose duty it is to tax the costs a burden of extreme difficulty. In many cases, in order to determine the question raised by the defence of compulsory pilotage, the general circumstances attending the collision must be inquired into, and the evidence necessary to support such a defence would be nearly the same as that which would be required in order to determine which vessel was to blame.

After carefully considering the matter, I can see no reason to induce the Court to exert so strong an authority as to alter a rule which is undoubtedly of ancient standing. I must refuse to condemn the defendants in any portion of the costs, but, as this is the first time the question has been solemnly argued, I shall make no order as to the costs of this application.

Solicitor for plaintiffs: *Cooper.*

Solicitors for defendants: *Clarkson, Son, & Greenwell.*

THE CITY OF MOBILE. (L. 108.)

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Nov. 11.

Wages and Disbursements—Counter Claim—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 191.

In a cause of wages and disbursements instituted on behalf of a master, himself a co-owner, against other part owners, the defendants may plead in answer that on a balance of account between the plaintiff as master and co-owner and the defendants nothing is due to the plaintiff.

THIS was a cause of wages and disbursements instituted on behalf of the master of the *City of Mobile* against certain persons owners of shares in the said vessel.

The plaintiff alleged in his petition that he had been appointed master of the *City of Mobile* in January, 1870, at the wages of 300*l.* a year, with 20*s.* a week board wages when living on shore, and had made two voyages in her; that in respect of the former of the two voyages his account for wages and disbursements had been settled, but that though he had duly delivered in to the defendants his account for wages and disbursements during the latter voyage, such account, which amounted to the sum of 556*l.* 11*s.* 3*d.*, was due and unpaid, and was then claimed by him in the suit.

The defendants, in the first paragraph of their answer, pleaded as follows:—

The defendants admit that the plaintiff earned wages and made certain disbursements as master of the *City of Mobile*, but they say that his accounts in respect thereof are not accurate, [and that the plaintiff was, during the voyage in respect of which he is claiming, and that he still is, owner of sixteen sixty-fourth parts or shares in the said ship, and that accounts are outstanding and unsettled between the plaintiff and the defendants as co-owners of the said vessel, and that upon the balance of all the accounts between the plaintiff as master and co-owner and the defendants nothing is due to the plaintiff, but on the contrary that a sum of money is due from the plaintiff to the defendants.]

The answer concluded with the following prayer:—

And the solicitors for the defendants pray the Right Honourable the Judge to refer all the accounts outstanding and unsettled between the plaintiff and the defendants, both as to the wages and disbursements of the plaintiff as master of the said ship, and as to the earnings and disbursements of the said ship, to the registrar assisted by merchants, to report thereon and to condemn the plaintiff to

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pay the defendants the balance which shall appear due from him to them, with costs; and that further and otherwise right and justice may be administered in the premises.

R. G. Williams, and *J. H. James*, on behalf of the plaintiff, moved the Court to strike out so much of the first article of the answer as is printed above within brackets, and that part of the prayer which prayed that the accounts between the plaintiff and defendants as to the earnings and disbursements of the said ship should be referred to the registrar and merchants. In *The D. Jex* (1) Dr. Lushington held that the master's claim for wages must be confined to the transactions between himself and the owner in their capacities of master and owner. It is not competent for the Court to enter in a wages suit into the investigation of accounts between the parties as co-owners. It has always been the practice of this Court to afford a ready remedy to masters and seamen for their wages; and it would lead to great inconvenience if a master who was also part owner could not obtain his wages until complicated co-ownership accounts had been gone into and settled: Parsons on Shipping, vol. ii. p. 433. The defendants are not without their remedy, because they may institute a cause of co-ownership, in which the Court will have full jurisdiction to settle the co-ownership accounts.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *E. C. Clarkson*, for the defendants. The terms of the 191st section of the Merchant Shipping Act are comprehensive enough to include a counter claim arising out of co-ownership accounts. The very object of that section was to prevent a multiplicity of suits. Why should it be necessary to institute a cross suit? *The Glentanner.* (2)

Williams, in reply.

SIR ROBERT PHILLIMORE. This is an application to the Court to strike out certain portions of the answer in a suit of wages and disbursements instituted on behalf of the master of the vessel *City of Mobile* against certain owners of the res. The master of the vessel is himself a co-owner, and his co-owners set up a defence that accounts are outstanding and unsettled between the plaintiff and the defendants as co-owners of the ship, and that upon a

(1) 13 L. T. (N.S.) 22; 2 Mar. Law Cases, 363. (2) Swa. Adm. 415.

balance of all the accounts between the plaintiff as master and co-owner and the defendants, nothing is due to the plaintiff. Now, I think it would be impossible to deny that the language of the 191st section of the Merchant Shipping Act is amply wide enough to cover the set-off pleaded in the article objected to, and the only question which has perplexed the mind of the Court is whether the decision in the case of *The D. Jex* (1) affords a precedent which limits the construction to be put upon the words of the clause in the manner contended for; that is, whether the provisions of the section are solely confined to a set-off of claims in the capacity of master and owner, or include a set-off of claims arising out of the relation which exists between the plaintiff and defendants as co-owners. In the case of *The D. Jex* Dr. Lushington said:—"Now, what is the meaning of the words 'to settle all accounts then arising or outstanding and unsettled between the parties to the proceedings?' It will be observed, that it was only in a case of a set-off or counter claim that this power was conferred upon the Court. It is true that in this case there has been a counter claim; but it appears to me that the intention of the legislature was not to refer to this Court the decision of all questions which might exist between the parties on matters entirely foreign either to wages or disbursements. The object of this section was to enable the Court to do justice where the owners set up a counter claim with reference to the ship or her disbursements. All these are matters properly cognisable by the Court of Admiralty, but the wide exposition set up by the plaintiff might include matters wholly foreign to its jurisdiction, and to the decision of which it is unaccustomed."

Now it has been truly said, that it would be competent to the Court to entertain the counter claims now set up by the defendants in another suit, and that in all probability the Court would hold its hand and not pay out the sum found due to the master for wages till after the decision in the cross suit. It is clear that these counter claims relate to the ship and her disbursements. Then the Court has a strong inclination, in the interests of justice as well as of the parties, not to lean towards that construction of

(1) 13 L. T. (N.S.) 22; 2 Mar. Law Cases, 263.

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the section which would lead to a multiplicity of suits. I am of opinion that the portions of the answer objected to should stand; and I must therefore reject the prayer of the motion. The costs to be costs in the cause.

Solicitors for plaintiff: *Whitely & Maddock.*
Solicitors for defendants: *Martin & Martin.*

Aug. 2.

THE CITY OF BRUSSELS. (6438.)

Taxation of Costs—Outport Charges—Agent not a Proctor or Solicitor.

In an outport bill brought into the registry for taxation by a proctor who acted as proctor for parties in a cause, charges were made for work done in the cause by a notary at an outport. The notary was neither a proctor, an attorney, nor a solicitor. A portion of the work for which these charges were made was work connected with the preparation of briefs and affidavits in the cause, and was such as is usually done by solicitors. The charges for this portion of the work the Court disallowed.

THIS was a cause of salvage instituted by Henry Charles Coote, on behalf of the plaintiffs, able seamen, and others, who had formed part of the crew of the steamship the *City of Paris*, against the screw steamship *City of Brussels*. Both steamships were vessels trading between New York and Liverpool. Witnesses on behalf of the defendants had been orally examined before the Court on the 6th of May, 1873, and on the 28th of June, 1873, the cause came on for further hearing, when the Court pronounced a decree in favour of the plaintiffs for 600*l.*, and condemned the defendants in costs. The proctor for the plaintiffs then brought his bill of costs into the registry for taxation. Together with this bill of costs, which contained the charges made by the proctor as his own proper charges, an outport bill was brought in by him, containing charges called "outport charges." (1) The outport charges were for work which had been done at Liverpool by a notary who was neither a proctor, an attorney, nor a solicitor. The notary had in the first instance obtained the authority of the plaintiffs to institute the suit, and had throughout the case been

(1) See Williams and Bruce's Ad. Prac. App. ccx. n. (a).

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in constant communication with them at Liverpool, and had done a great portion of the work ordinarily done by solicitors in preparing the case for trial. On the taxation of the costs the registrar disallowed many of the items under the head of outport charges; but he allowed items under that head amounting to 39*l.* 2*s.* 4*d.*

Among the items allowed by the registrar under the head of outport charges were the following:—

	£	*s.*	*d.*
Drawing brief for the examination of defendants' witnesses	2	0	0
Two fair copies for counsel	1	6	8
Two fair copies of captain's deposition, to accompany	0	5	0
Attending twelve of plaintiffs, taking instructions for affidavit	1	1	0
Drawing same	3	8	0
Engrossing affidavit	1	14	0
Oath	0	2	6
Drawing brief for the hearing . . .	7	10	0
Two fair copies for counsel	5	0	0
Agency	10	10	0

July 30. *Milward, Q.C.*, and *Cohen*, on behalf of the defendants, moved the Court to direct the registrar to review his taxation of the plaintiffs' bill of costs by disallowing the outport charges and such portion of the town bill as related to the work done at the outport. The charges are made in respect of work which can only be done by a solicitor or proctor. The 33 & 34 Vict. c. 97, s. 59, renders it clear that the charges are irregular.

E. C. Clarkson, and *Gibson*, contrà. A practice has long been recognised in the court of allowing certain charges under the head of "outport charges." Formerly, when proctors only were allowed to practise in the court, it did not matter whether the person acting as their agent at an outport were or were not a solicitor. In the present case the bill has been brought in by the proctor, and the Court is asked to allow to him the charges in question. If the proctor had sent down a clerk from his office to Liverpool to do the work in question, there can be no

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doubt he would have been entitled to charge for it, and it can make no substantial difference that the work was done at Liverpool by a notary acting as the agent for the proctor. The notary at Liverpool was acting, pro hâc vice, as a clerk to the proctor.

Milward, Q.C., in reply. The notary at Liverpool was not acting as the clerk or agent of the proctor; if he had been so acting it could have been proved; but the facts before the Court shew plainly enough that the notary at Liverpool had the management of the cause, and that the proctor was acting very much as a London agent acts for a solicitor in the country.

Cur. adv. vult.

SIR ROBERT PHILLIMORE. In this case objections have been taken to certain items allowed by the registrar in the bill of costs brought in by the proctor of the plaintiffs. The principle upon which the objections are founded is, that a person who is not a proctor or solicitor, employed in a case of salvage as agent by the proctor at an outport, has been allowed remuneration for doing work which the law does not permit to be done except by a proctor or solicitor.

Two bills were delivered in by the proctor in this case, one entitled "plaintiffs' bill," the other "outport charges;" but the only person who is responsible, and who seeks for payment, is the proctor. It is easy to see how the custom of presenting two bills arose under the old practice of the Court. In my recollection all causes were conducted by affidavits, and evidence vivâ voce was never taken. It was then just as lawful to employ an unprofessional agent as a solicitor. Moreover, from the nature of these salvage suits, it was necessary to collect evidence from sailors in different outports, and an agent was almost necessarily employed for that purpose. The expenses incidental to his employment were allowed on taxation, and gradually, for the sake of supposed convenience, his charges formed the subject of a separate bill, though the agent himself had no persona standi before the registrar and the Court, and could obtain payment from the proctor only. This practice, however, of separate bills is, upon various grounds, now objectionable, and must be discontinued for the future.

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The substantial question before me is, whether the proctor is to be allowed to charge, in the "outports charges" bill, for certain acts done by his agent. The charges amounted to 87*l.* 8*s.* 9*d.* 39*l.* 2*s.* 4*d.* were allowed on taxation; no charges were allowed for acts done by the agent before the proctor appeared before the Court as conducting the case. But certain acts since he so appeared have been done by the agent, and for these the proctor claims to be paid, that he may pay his agent for them. These acts, it is alleged, are such as the general policy of the law, and several statutes enforcing that policy, forbid. I am of opinion that there are in this case certain charges allowed which, on the face of them, do violate this policy. At the same time I wish it to be understood that I do not pronounce the employment of agents at outports in these cases unlawful, or that they may not act as clerks, pro hâc vice, of the proctor, and be remunerated on that ground. An illustration of what I mean is afforded by the case of *The Karla* (1), in which the expenses of an agent employed to see foreign witnesses and interpret what they said was allowed by the Court. But the items that I am about to disallow challenge attention as claiming remuneration for acts done, not as agent, but substantially, so to speak, as proctor or solicitor. The general charge for agency, 10*l.* 10*s.*, I think quite proper; the items which I disallow are, all the charges connected with the brief and the affidavits, except the fees paid to the commissioners on swearing the affidavits. With regard to the costs of this motion I shall make no order. The practice, I must say, has been uncertain, but has rather appeared to warrant this charge; and I have no doubt what Mr. Milward said to me was correct—that his clients were only desirous to see that the law was enforced.

Proctor for plaintiffs: *H. C. Coote.*

Solicitors for defendants: *Gregory, Rowcliffe, & Rawle.*

(1) Br. & Lush. 367, 369.

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Jan. 22.

THE LANCASHIRE. (L. 126.)

Collision—Duty of Steam-vessel in dense Fog.

Post 205

A steam ferry-boat started in a dense fog to cross a navigable river, those in charge of her having been informed that vessels were anchored in or near her track. The ferry-boat, although navigated with all ordinary care, ran into and damaged a ship at anchor:—

Held, that the ferry-boat was to blame.

This was a cause of damage instituted on behalf of the owners of the screw steamship *Levant* against the steam ferry-boat *Lancashire*.

The circumstances of the collision, as stated in the petition, were as follows:—The *Levant*, about 1 a.m., on the 26th of October, 1873, came to an anchor in the river Mersey in a clear berth and in a safe and proper anchorage. When she came to an anchor it was a fine and pretty clear night; two bright lights were exhibited in the rigging of the *Levant* in compliance with the regulations in force in the Mersey, and the lights continued to burn brightly until the collision. Later in the morning a dense fog set in, and the fog bell on board the *Levant* was duly sounded. Between 7.15 and 7.25 a.m. the *Lancashire*, which was a steam ferry-boat plying between Birkenhead and Liverpool, was seen by those on board the *Levant* approaching at a rapid rate of speed. The *Lancashire* was hailed by those on board the *Levant*, but she continued to approach at great speed and with her port sponson struck the starboard side of the stem of the *Levant*. Those on board the *Levant* heard the whistle of the *Lancashire* as the latter came in sight, and at this time the fog was so dense that a vessel could not be seen a ship's length off.

The 10th article of the petition was as follows:—"Having regard to the state of the weather, it was an improper proceeding on the part of those on board the *Lancashire* to cross the river Mersey."

The answer filed on behalf of the owners of the *Lancashire* stated, inter alia, that the *Lancashire* left the Woodside landing-stage for the St. George's landing-stage at a quarter-past seven. A good look-out was kept. The master was at the engine telegraph, one man was forward on the saloon deck on the look-out, two men

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were at the wheel, and one man was at the steam whistle. The *Lancashire* proceeded at a slow speed, about three knots an hour. At the time the *Lancashire* left the Woodside landing-stage there was a dense fog, the wind calm. From the time of leaving the stage the whistle was continuously sounded. A few minutes after leaving the Woodside landing-stage, and in about mid-river, the look-out man forward called out, "Vessel right ahead!" The engines were immediately reversed full speed. The *Levant* was anchored in the regular track of the Woodside ferry-boats. The 6th and 7th articles of the answer were as follows:—

6. Except so far as they are herein admitted, the defendants deny the truth of the allegations contained in the plaintiffs' petition.

7. The said collision was caused wholly by the negligent and improper conduct of those on board the *Levant*. They anchored their vessel in an improper and unsafe berth in the known track of the ferry steamers. They had not a proper look-out, nor a bell ringing as required by law.

Jan. 21. The case came on to be heard, and the hearing was continued on the 22nd of January. The result of the evidence, so far as material, appears from the judgment.

The *Admiralty Advocate* (*Dr. Deane, Q.C.*), and *Myburgh*, for the plaintiffs.

Milward, Q.C., and *Tidswell*, for the defendants.

SIR ROBERT PHILLIMORE. In this case the *Levant*, a screw steamship of 472 tons register, and the *Lancashire*, a large paddle-wheel steam ferry-boat, came into collision on the 26th of October last, about thirty minutes past seven in the morning. The exact place is a matter of controversy, but it is sufficient to state at present that it was between the Woodside landing-stage and the St. George's landing-stage, and one-third from the Liverpool side. It appears from the evidence that the *Levant* had been brought by the pilot, at about forty-five minutes past one in the morning, out of the Queen's Basin; and he says that he anchored her abreast of the Albert Warehouses, and brought her up by her starboard anchor with sixty fathoms of chain. A great deal of the discussion which has taken place before me has turned on the particular position in which the *Levant* was placed by the pilot. There is in this, as, I regret to say, in other parts of the case, a very great

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conflict of testimony. It is not to be laid out of consideration that the *Levant* was brought up on the flood tide, and the ebb tide, of course, would make a considerable difference in her position. That she was, at the time of the collision, lying north and south, with her head to the south, there is no doubt at all. Upon the evidence it appears to the Court probable that she was not exactly in the place that is described, either by the witnesses produced on behalf of the *Levant*, or by those produced on the part of the *Lancashire*. She was probably nearer to the outside line—the southern line of the track in which this ferry-boat was in the habit of going; even if she was not actually within the lines of the track, she was probably nearer the southern line than she represented herself to have been. However, she certainly was not in a place where it was unlawful for her to be; nor can I say, upon the evidence before me, that she was in a place in which it was improper for her to be.

I should observe, before I go into the other parts of the case, that the damage was slight; and I think that fact has been fairly used by the counsel for the *Lancashire* in aid of establishing the position that the ferry-boat, the *Lancashire*, was not going at a great speed at the time when the collision happened. I think I may as well say at once, to get rid of this part of the case, that the result of the evidence appears to be that she was going at the rate of about three knots an hour at the time the collision happened.

The *Lancashire* crosses, as I understand, about every ten minutes till eight o'clock in the evening, and after that once every hour during the night. She set out from the Woodside Ferry somewhere about a quarter-past seven o'clock in the morning. Before she started there had come on a very dense fog. There is no dispute whatever as to this fact. It was a very dense fog, and the captain who had come over from the Liverpool side on the preceding trip warned the other captain to whom he gave up his charge, and who went back with her to the Liverpool side, that he had passed three vessels, which were lying—to use his own expression—badly in her track.

Now a very great deal of dispute has arisen as to the position of these two other vessels. It was stated by several of the witnesses produced on behalf of the *Lancashire* that these other vessels were

also in the usual track of the ferry steamers. But it was fairly admitted by the manager, Mr. Penny, who was the last witness examined, and by other witnesses, that those two vessels to the north and south were out of the track of the ferry-boats. Captain White, who came over in command of the *Lancashire* on her last expedition from the Liverpool shore before the collision, tells us that he passed the *Levant* at twenty minutes past six, that he hailed her, sounded his whistle, and could get no answer, and he passed on. As the fog was just beginning to shew itself at that time, it seems a very strange thing that, if he thought the *Levant* was in a dangerous position, he should have contented himself only with hailing and whistling, and should have passed on without having drawn the attention of those on board to the situation in which she was. However, such appears to have been the case, and, as I have already said, he thought it his duty to warn the captain who succeeded him, Captain Howard, that there were three vessels badly in his way, or, as Captain Howard says, "He told me there were three steamers lying right in the track, two ringing their bell, and the centre one he could not get an answer from, but she was called the *Levant*."

The question arises in this case, whether it was proper and right in this ferry-boat to go deliberately across the river in a fog of such a dense nature as here described, and with the knowledge of these vessels lying in her track, or one of them in her track and the others nearly so, and also with the knowledge that one of them had, as she contends, an insufficient watch? It has been urged very strongly on the Court, that if this were not to be so, if the steam ferry-boat was to be delayed on account of the fog, the greatest possible inconvenience would ensue to the public. I have no doubt that it is very much for the convenience of the public that the ferry-boat should go in all weathers and at all times, but at the same time, I cannot myself think it right to set the convenience of the public in competition with the possibility, or rather the probability, of injuring human life and greatly damaging property. At the same time, the custom appears to have been for this vessel to have gone across in foggy weather as at other times, and regulations appear to have been made with a view to preventing accidents, surrounding her with every precaution that was possible.

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That such precautions are not always available is perfectly clear, not only from what has happened in this case, but from the evidence of White himself, the captain of the ferry steamer, who says he has met occasionally with disasters in fog time, and from the knowledge which unfortunately the Court has acquired that such disasters have occurred notwithstanding the precautions which the legislature has provided. But one thing appears to me quite clear—that if this ferry steamer thinks herself justified in going across the river in such a dense fog as this, she takes upon herself all the responsibility incident to such a course. She has the advantage if she goes over safely, and she must have the disadvantage if she injures life or property in the course of the passage.

One of the questions which I thought it my duty to put to the Elder Brethren was, assuming that there was no bell rung on board the *Levant*, and taking into consideration the assistance which the *Lancashire* derived in her navigation from the ringing of the bell, which, according to the evidence, is always rung on the St. George's landing-stage during fog, and from the knowledge of where these three vessels were on this occasion, whether ordinary care would still have avoided the collision? The Elder Brethren are of opinion—and I agree with them—that in such circumstances the collision might have happened in spite of ordinary care, and that, assuming the *Lancashire* had a right to cross the river on this occasion, and assuming that there was no bell rung on board the *Levant*, the *Lancashire* could not be found to be to blame.

Upon this follows the next question, which is really and in fact the important question in this case, namely, the question whether the *Levant* did comply with the requisition of the law in ringing a proper bell at proper times during the prevalence of this fog. On that question the great controversy in the case has arisen, and there is unfortunately in this case, as often happens in this court, the greatest possible conflict of evidence upon the point. [The learned judge here reviewed the evidence on this point at some length.] Looking to the circumstances of the case, and without going further, although other discrepancies might be pointed out, I am of opinion that the *Levant* has established the fact that her

bell was rung at this time. It follows, as a consequence, that if the bell was rung by the *Levant*, she did all that it was her duty to do. I must, therefore, pronounce that the *Lancashire* is alone to blame for this collision. 1874 THE LANCASHIRE.

Before I leave this case I wish to make an observation in consequence of what was said by counsel with respect to an error which I think the receiver of wreck has fallen into. He seems to have thought it his duty, when he took the statement of one of the witnesses in this case, not simply to take down the witness's evidence as he gave it, but to import, however conscientiously, other evidence into it. That is a very great error on his part, and I trust will not be repeated by any receiver of wreck in the future. It will tend to make the depositions of witnesses of no value at all in this court.

Solicitors for plaintiffs: *Duncan, Hill, & Parkinson.*
Solicitor for defendants: *Ambrose Waln.*

THE OTTER. (6543.)

Jan. 28.

Practice—Right to begin—Collision—Duty of Steamship in Fog.

In a damage suit the practice of the Court requires the plaintiff to begin, notwithstanding that the defendant raises no other defence than that of inevitable accident.

In a dense fog it is the duty of a steam-vessel to anchor as soon as circumstances will permit. A steam vessel proceeding, though at a moderate speed, under steam in a dense fog, after she reached a proper anchorage ground, held to blame for so doing.

THIS was a cause of collision instituted on behalf of the owners of the steamship *J. H. Lorentzen* against the owners of the late steamship *Otter*. The petition alleged in substance as follows:—

1. The steamship *J. H. Lorentzen* in the course of a voyage encountered thick and foggy weather, and in consequence was brought to anchor between Mundesley and Hasborough, on the coast of Norfolk.

2. Between 7 and 7.30 a.m. on the 20th of February the *J. H. Lorentzen* was riding at anchor as aforesaid in a good and proper berth, Hasborough light-vessel bearing about north-east by north; Hasborough Church about south-west by south, and distant about five miles; Bacton bearing about south-west by west half-west, and Cromer light about north-west by west. The wind was very light

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from the west, and it was very foggy. The tide was in the last quarter ebb and of the force of nearly two knots an hour. The *J. H. Lorentzen* was riding with her head about south south-east; a good look out was being kept on board her, and her bell was being frequently sounded, as required by law.

3. In these circumstances those on board the *J. H. Lorentzen* heard a whistle sounding several times on their port bow. Their bell was kept going. After a little time those on board the *J. H. Lorentzen* observed a steamship, which was the *Otter*, whose owners are proceeded against herein, about half a ship's length off, and crossing their bows from port to starboard; those on board the *J. H. Lorentzen* hailed the *Otter* to port her helm; but instead of this being done, the helm of the *Otter* was put a-starboard, and the *Otter* almost immediately came into collision with the *J. H. Lorentzen*, striking her on her stem with the starboard quarter very violently, and doing her considerable damage.

4. Shortly after the collision the *Otter* herself sank from the damage which she received. Her master, crew, and passengers were received on board the *J. H. Lorentzen*.

5. The collision aforesaid and the damage consequent thereon were caused by and are wholly attributable to the neglect, default, or mismanagement of the *Otter* or those on board her.

The answer stated in substance as follows:—

The *Otter* was in the wold off Hasborough; there was a thick fog, and she was under steam, proceeding dead slow, feeling her way with the lead with a view to finding a safe and proper anchorage, and to coming to anchor on account of the fog. She was heading about south-west, a good look out was being kept, and her steam whistle was being duly sounded at short intervals.

At such time the bell of the *J. H. Lorentzen* was heard, and immediately afterwards the *J. H. Lorentzen* was made out through the fog at a very short distance from the *Otter*, and bearing about a point on the starboard bow. The engines of the *Otter* were stopped and her helm was put hard a-starboard, but she, with her starboard quarter came into collision with the stem of the *J. H. Lorentzen*, and the *Otter* received so much damage that she shortly afterwards foundered.

Save as herein appears, the defendants deny the truth of the several statements and allegations contained in the five first articles of the petition filed in this cause, and say that the collision was, so far as the *Otter* was concerned, the result of inevitable accident.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *W. G. F. Phillimore*, for the plaintiffs.

E. C. Clarkson, and *R. E. Webster*, for the defendants.

The plaintiffs' counsel submitted that the onus of proof rested upon the defendants, and that according to the practice of the Court the defendants were bound to begin.

SIR ROBERT PHILLIMORE. The practice of the Court has of late rather got out of gear as to the right to begin in cases of damage

where the defendants rely on a defence of inevitable accident. Up to the time of the decision of the Judicial Committee of the Privy Council in *The Marpesia* (1) I, following the practice of my predecessor on the point, was accustomed to hold that a defendant in a damage suit, relying upon the defence of inevitable accident, was bound to begin; but after that case I thought it my duty to hold that in such a case the party complaining must begin. In the case of *The Benmore* (2), where the only defence raised on the pleadings was inevitable accident, I said that after the decision in *The Marpesia* (1) I could no longer allow the former practice to prevail, and I then ruled that the plaintiff must begin. Again, in the case of *The Abraham* (3), I thought that the effect of the ruling in *The Marpesia* (1) was to oblige me to call upon the plaintiffs to begin. It is right there should be a definite rule on the point, and I wish the practice to be finally settled. Until the Judicial Committee express a different view, I shall rule that the plaintiffs must begin in all cases of damage.

The witnesses on behalf of the plaintiffs were then examined orally before the Court, and witnesses were afterwards called on behalf of the defendants. The result of the evidence appears from the judgment. At the conclusion of the evidence the counsel for the parties were heard. The following cases were cited: *The Girolamo* (4); *The Lancashire.* (5)

SIR ROBERT PHILLIMORE. It is admitted that the exact spot where the collision occurred is correctly described in the petition. The *J. H. Lorentzen* was on a voyage from Sunderland with a cargo of coals to Portsmouth; in the course of her voyage she found herself in a dense fog, and, in consequence, about a quarter to one o'clock in the morning of the 20th of February, 1873, she anchored in about thirteen fathoms water at the place where the collision afterwards occurred. There she lay in safety until about half-past seven in the morning, when the starboard quarter of the

(1) Law Rep. 4 P. C. 212.
(2) Ante, p. 132.
(3) 2 Mar. Law Cases (N.S.), 34.
(4) 3 Hagg. Adm. 169.
(5) Ante, p. 198.

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Otter came into collision with her stem; the *Otter* sustained so much damage that she shortly afterwards sank.

Now, the first question to be considered is: was the *J. H. Lorentzen* anchored in a proper place, and did she observe the precautions required by law to be observed by a vessel at anchor in a fog? The Elder Brethren are of opinion, and I concur with them, that she anchored in a proper place, and we are also of opinion, upon the evidence, that she observed all due precaution by ringing her fog bell as often as the law required; indeed it seems to have been rung much oftener. If, then, the case is, as I must hold, that the *J. H. Lorentzen* is in no wise to be blamed for the collision, the further question arises, was the collision occasioned by inevitable accident so far as the *Otter* was concerned?

Here I must refer to the statement of the case as set up by the *Otter*. The *Otter* says, in her statement, that she was on a voyage from Newcastle to Antwerp with a general cargo and passengers, and was in the wold off Hasborough; the tide was ebb and of the force of about three knots per hour, and there was a thick fog—as dense a fog, the evidence proves, as well could be. The *Otter* (the answer goes on to say) was under steam, proceeding dead slow, feeling her way with the lead, with a view to finding a secure and proper anchorage, and to coming to anchor on account of the fog.

Now, what was the duty of the *Otter* in such a dense fog? I am of opinion she was, from the time she passed the Hasborough light-vessel up to the time of collision, in a fair and proper anchorage ground. I am of opinion, and with this opinion the Elder Brethren agree, that she ought to have come to an anchor before the collision. She knew her whereabouts, and she ought to have stayed where she was until the tide turned. It was merely an act of common prudence that she should have dropped her anchor in the position she found herself in before the collision occurred. The Elder Brethren assure me that it was unnecessary for her to have proceeded under steam in search of an anchorage when she already was, as the evidence shews, in water as shallow as thirteen fathoms. It has been said that article 16 of the "Regulations for preventing Collisions at Sea," which provides

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that "every steamship shall, when in a fog, go at a moderate speed," is inconsistent with a positive obligation upon the vessel to anchor. But I am of opinion that the legislature could not have intended to lay down the rule that there may not be circumstances in which it may become the duty of a steam vessel, when she finds herself in a fog, to bring up. With regard to the speed at which the *Otter* was going, I think she was proceeding at a moderate speed, and I do not pronounce upon the question whether the manœuvre the *Otter* adopted, but unsuccessfully, to avoid the *J. H. Lorentzen* was or was not the right manœuvre; but for the reasons I have already stated, I think that the *Otter* has not made out the plea of inevitable accident raised by her. I find the *Otter* alone to blame for the collision.

Proctor for plaintiffs: *Cyrus Waddilove.*
Solicitors for defendants: *Gellatly, Son, & Warton.*

[IN THE CONSISTORY COURT OF LONDON.]

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Dec. 15.

WHITE AND OTHERS *v.* BOWRON.

Ornaments of the Church—Baldacchino—Canopy over Communion-table.

A baldacchino, or marble canopy, erected over the communion-table in a parish church, is not to be an architectural decoration, but an unlawful ornament, for which a faculty cannot be granted.

THIS was a business of citing all persons having any interest to enter an appearance and shew cause why a faculty should not issue to the vicar and churchwardens of the parish of St. Barnabas, Pimlico, in the county of Middlesex and diocese of London, authorizing the erection of a baldacchino in the said church of St. Barnabas, at the promotion of the said vicar and churchwardens.

The citation issued in the cause was, so far as material, as follows:—

Thomas Hutchinson Tristram, Doctor of Laws, Vicar-General of the Right Honourable and Right Reverend Father in God, by divine permission Lord Bishop of London. To all clerks and literate persons, &c. Whereas it has been represented unto us by a petition under the hand of the proctor, for the vicar and churchwardens of the parish of St. Barnabas, Pimlico, in the county of Middlesex,

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that it being considered desirable to erect a baldacchino in the church of St. Barnabas, Pimlico, aforesaid, for the adornment of the east end thereof, a plan and estimates were prepared forthwith, and on the 15th day of April, 1873, a vestry meeting duly convened for that purpose was held in the vestry-room of the said church, when the plan and estimates were submitted, and it was unanimously agreed that the proposed baldacchino should be erected in accordance with the said plan. And whereas the said petitioner has humbly besought us to decree a licence or faculty for the purpose aforesaid, wherefore we do hereby require you to cite or cause to be cited, all persons having or pretending to have any interest in the premises, to enter an appearance in our registry, situate at No. 3, Godliman Street, Doctors Commons, in the City of London, within fifteen days after service hereof, and to shew good and sufficient cause why a licence or faculty should not issue in pursuance of the prayer of the said petition.

This citation was duly served and returned into the registry, but no appearance was entered on behalf of any person within fifteen days from the service thereof.

Aug. 4, 1873. *W. G. F. Phillimore* moved the Court to decree a faculty or licence authorizing a baldacchino to be erected in the said parish church in the manner indicated in the plan referred to in the citation, and the Court took time to consider its judgment.

On the 11th of August an appearance was entered by leave of the Court for William Bowron, a resident parishioner of St. Barnabas, Pimlico, and on his behalf an act on petition was brought in wherein his proctor alleged substantially as follows:—

1. That his party is a parishioner and inhabitant of the said parish of St. Barnabas, Pimlico.

2. That it is not desirable to erect a baldacchino in the said church for the adornment of the east end thereof, because such an unaccustomed erection would not be a lawful or a suitable adornment of the east end of the said church.

3. That if such an unaccustomed adornment as a baldacchino were lawful, the erection would not be profitable or expedient as being opposed to the religious convictions and feelings of a large number of the parishioners of the said parish.

4. That at the vestry meeting convened on the 15th day of April, 1873, it was not agreed that a baldacchino should be erected at the east end of the said church.

The proctor for the vicar and churchwardens, in answer to this act on petition, alleged as follows:—

1. That the first article of the said act on petition is true.

2. That he submits to the Court the several allegations contained in the 2nd Article thereof.

3. That it is not true, as stated in the 3rd Article thereof, that, &c., but that on the contrary this erection is much desired by a very large number of the parishioners of the said parish, who are members of the Church of England.

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4. That the vestry meeting held on the 15th day of April, 1873, was summoned by a notice to the following effect:—"Notice is hereby given that a vestry meeting for the parish of St. Barnabas, Pimlico, will be held on Tuesday, the 15th day of April next, to elect churchwardens for the people, and also to consider Mr. Street's plans for the adornment of the east end of the church." The said notice having been exhibited on the outer door of the said church three clear days previous to the said meeting.

5. That the proceedings at the said vestry meeting are correctly stated in the minutes thereof recorded in the vestry book and filed in this business.

6. That save as has been heretofore admitted, the several allegations contained in the said act on petition are untrue.

Oct. 23, 24. On these days the case came on again for hearing and argument. (1)

W. G. F. Phillimore appeared for the vicar and churchwardens, in support of the prayer of the petition recited in the citation.

A. J. Stephens, Q.C., on behalf of Mr. Bowron, opposed the grant of the faculty.

Affidavits were filed on behalf of the vicar and churchwardens, which stated that canopies, baldachins, or baldacchinos surmounting the communion-table were still in existence in the following consecrated churches and chapels of the Church of England:—St. Mary, Woolnoth; St. Dunstan in the East; St. Augustine, Haggerstone; St. George, Bloomsbury, all in the diocese of London; Trinity College Chapel and Clare College Chapel, in the diocese of Ely; Lincoln Minster; St. Barnabas, in the city of Oxford; Totnes parish church; Sidcup parish church, in the diocese of Canterbury; St. John, Miles Platting, in the county of Lancaster; and that in the consecrated churches and chapels of the Church of England enumerated in the following list were to be found canopies and coverings, not supported by pillars, but projecting over the communion-table:—The parish church of Burford, in the county of Oxford; the Beauchamp Chapel, Warwick; St. Michael, Tenbury, in the county of Worcester; Wadham College, in the city of Oxford; and the parish church of Houghton-le-Skerne, in the county of Durham.

The arguments addressed to the Court were chiefly directed to the question whether structures similar to the baldacchino it was proposed to place in the church of St. Barnabas, Pimlico, had since

(1) The hearing took place in the Chapter House of St. Paul's Cathedral.

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the Reformation, and with the sanction of lawful authority, been allowed to remain without objection within churches of the Church of England, and could at the present day, on sufficient cause being shewn, be lawfully erected under a faculty, as architectural decorations.

In the course of the arguments the following authorities were referred to:—Shakespeare's Henry the Eighth, act ii., scene iv.—stage directions, act iv., scene i.; Rock's Hierurgia, pp. 505, 506; Johnson's Canons, vol. ii.; Archbishop Walter, A.D. 1195, p. 76, A.D. 1200, p. 85; Archbishop Peckham, A.D. 1279, p. 264; Texier and Pullan, Byzantine Architecture, p. 132, and plate 33; *Faulkner* v. *Litchfield* (1); Viollet-le-Duc, Dictionary of Architecture; North, Chronicle of the Church of S. Martin, Leicester, pp. 97, 102, 129; 1 Cardwell, Documentary Annals, pp. 17, 42, 221; Phillimore's Eccl. Law, vol. ii. pp. 1061, 1873, 1918; Peacock's Church Furniture, pp. 45, 62, 74, 80, 94, 101, 106; Rock's Church of Our Fathers, vol. iii., plate 2, pp. 203, 207–8; Rituale Romanum, book ii., ch. 33 (ed. 1651), p. 64; Missale Romanum (ed. Mechlin), 1842, p. 162; Bingham, Church Antiquities, book viii., ch. 6., s. 18, vol. ii., p. 453, "On the ciborium." Du Cange, Glossary; "Baldakinus:" Bavetti, Dict. ed. by Davenport and Comelati; "Baldachino:" Latham's Dict. of the English Language, "Baldachin": Fairholt's Dict. of Terms in Art; Glossary of Eccl. Terms, ed. Orby Shipley; "Baldachino": Liddell and Scott's Lexicon, s.v. "*κιβώριον*": Gibson, Codex, vol. ii. p. 1466 (2nd ed.); Bloxam, Gothic Architecture, p. 490; Magdalen College Register, Milner, History of Winchester Cathedral, part ii. p. 85; Longman, Hist. of 3 Cathedrals dedicated to St. Paul, pp. 111, 112; Le Keux, Memorials of Cambridge, vol. i. p. 54; Cardwell, Conferences, p. 272.

Cur. adv. vult.

Dec. 15. DR. TRISTRAM. This is an application to the Court by the vicar and the churchwardens of the parish of St. Barnabas, Pimlico, to issue a faculty authorizing the erection of a baldacchino over the communion-table of the church of that parish.

The petition for a faculty was filed in the month of June, 1873, and the petitioners had, in accordance with a practice not unusual

(1) 1 Robert. Ecc. 184.

in this diocese, previously submitted the plan for the baldacchino to the Bishop of London, and his Lordship, by an indorsement on the plan, directed the attention of the Court to the peculiar character of the proposed erection.

The practice in this diocese of submitting plans for proposed alterations in or additions to a church, to the bishop before applying for a faculty is of convenience to the applicants, as it affords them an opportunity of obtaining the advice or suggestions of the bishop in respect to the plan, and is of assistance to the chancellor, whose attention is directed by the bishop to any parts of the plan which may appear to his Lordship deserving of especial consideration.

The jurisdiction to grant or withhold faculties is, however, vested in the chancellor, who is bound to exercise such jurisdiction in accordance with the law and practice of the Court, and from his decision there is an ultimate appeal to Her Majesty in council.

Upon the petition being presented for the faculty in this case, the Court directed a citation to issue, but with an intimation that in consequence of the unusual character of the application it would require the faculty to be moved for by counsel in court.

Service of the citation having been effected, but no appearance having been entered to it, Mr. Phillimore, on the 4th day of August, as counsel for the vicar and churchwardens, moved for an order for the faculty to issue, and stated the grounds upon which he considered it was within the jurisdiction of the Court to grant the application; and I then reserved my decision.

A few days afterwards, on the 11th day of August, Mr. Bowron, an inhabitant of the parish and a member of the Church of England, applied for leave to enter an appearance, to enable him to oppose the grant of the faculty on behalf of himself and other parishioners. I allowed his application, and he appeared first in person and afterwards by proctor, and an act on petition was brought in by his proctors, in which his opposition to the granting of the faculty was based substantially on two grounds, namely: first, that the erection of a baldacchino over the holy table was unlawful; and secondly, that if lawful, its erection, being opposed to the religious feelings and convictions, as he alleged, of a large number of the

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parishioners, the Court in the exercise of its discretion ought to refuse the faculty. These averments were traversed by the petitioners, and affidavits were filed in support of the cases set up by the contending parties. On the 23rd and 24th of October the questions raised by the pleadings were argued by Mr. Phillimore on behalf of the petitioners, and by Mr. Stephens on behalf of Mr. Bowron, and I have to thank both the learned counsel for the assistance rendered to the Court by their able and learned arguments.

The proposed baldacchino is a handsome marble structure, or canopy, with a pointed roof and three gables pointing different ways, supported by four columns standing apart from the east wall of the church, and would cover the holy table, extending about two feet beyond the west side of the holy table, leaving sufficient space for the celebrant priests to stand within the canopy on the north and south sides of the table. During the argument numerous authorities were cited by the counsel on both sides in reference to the date of the introduction into the eastern and western churches of altar canopies, the different terms by which they were designated, their form, and the materials of which they were constructed, their symbolic signification and their use.

As the history of altar canopies is not without a bearing on the first and main question under the consideration of the Court, I will state briefly what appears to me to be the fair results of the historical information before the Court on these several heads. The earliest known instance of an altar canopy in the Christian church appears to have been one in the church of St. George at Thessalonica (referred to by Mr. Phillimore), and supposed to have been in use about A.D. 325; and from the representation of it extant (1), it would seem to have been a canopy fashioned like a cupola, or cup reversed, resting on four columns planted at the four corners of the altar, and between the columns were curtains, and three steps leading up to the altar.

This dome-like canopy amongst the Greeks was usually designated Κιβώριον (ciborium), from its resemblance to the bowl of a

(1) In Mosaic work, in one of the compartments of the dome of that church: see Byzantine Architecture, by Charles Texier and P. R. Pullan, pp. 132, 134, 136, 137, 212, plate 33. London: Day, 1864.

reversed cup: Bingham's Antiquities of the Christian Church, book viii. ch. vi. ss. 18, 19 (1); see also Rock's Hierurgia, p. 505. (2) Altar canopies were subsequently introduced into Italy, and were placed over the high altar, as well as into France and other countries in Western Europe. On the schism between the eastern and western churches, the use of the canopy of the ciborium in France was discontinued, but that of side curtains was retained; Dictionnaire Raisonné de l'Architecture Française du XI^e^ au XVI^e^ Siècle, par M. Viollet-le-Duc, vol. ii. p. 32, Paris, 1859. In later times, in Italy, the term ciborium was transferred to a tabernacle or diminutive temple erected on the altar, in which was placed a pyx containing the reserved sacrament, and the ancient canopy is said to have been thenceforward called umbraculum, or baldacchino, so called from Baldach, an old name of Babylon, from whence came the stuff or silken material of which such canopies were then principally composed.

In England the introduction into general use of altar canopies is referred to a constitution of Archbishop Peckham, A.D. 1279, requiring a tabernacle to be made in every church in future, with a decent enclosure, within which the reserved sacrament was to be placed in a pyx: 2 Johnson's Canons, p. 264. (3) From the interior of this canopy was suspended by a chain over the high altar a pyx or other vessel in the shape of a turret or a dove, containing the reserved sacrament. The words of the constitution, as given in Lyndwood, are as follows:—"Dignissimum Eucharistiæ Sacramentum præcipimus de cætero taliter custodiri, ut in quâlibet Ecclesiâ Parochiali fiat Tabernaculum, cum clausurâ, decens et honestum, secundum curæ magnitudinem et ecclesiæ facultates, in quo ipsum dominicum corpus non in bursâ vel loculo propter comminutionis periculum nullatenus collocetur, sed in Pyxide pulcherrimâ, lino candissimo interius adornatâ; ita quod sine omni diminutionis periculo facile possit extrahi et imponi." Lyndwood's Provinciale, lib. 3, tit. 25, p. 248, ed. 1679.

It was suggested by the counsel for the petitioners that the

(1) Vol. ii. p. 453, ed. 1843.

(2) Hierurgia or Transubstantiation, Invocation of Saints' Relics, and Purgatory expounded . . . by D. Rock, D.D. 2nd ed., 8vo. London, 1851.

(3) A Collection of the Laws and Canons of the Church of England, by John Johnson. 1720. Edited Library of Anglo-Catholic Theology. Oxford, 1851.

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erection enjoined by this constitution was that of a small inclosed tabernacle or diminutive temple, such as was in later times introduced into Italy, and frequently placed on the side altars for the reception of the reserved sacrament, and was not the altar canopy. But the commentary of Lyndwood (A.D. 1422) on Archbishop Peckham's constitution, in reference to the words "Tabernaculum" and "clausura," is inconsistent with this suggestion; for he there speaks of the pyx at that time as suspended over the altar in an open place, that it might be more readily presented to the view of the people, to receive their adoration.

In his commentary on the word "Tabernaculum" he says: "Sic dictum, quia de Tabulis sit factum, vel quia Tabulis vel lignis sit appensum."

And on the words "cum clausurâ," referring to a passage in the Extravagantes: ". . . ubi dicitur, quod in loco singulari, mundo, et signato, debet servari Eucharistia. Et ex hoc videtur, quod usus observatus in Anglia, ut scilicet in Conopeo pendeat super Altare, non est commendabilis, quia contra mentem dicti—*c. Sane*—ubi statuitur, quod non custodiatur in loco patenti sed singulari. Licet enim consuetudo Anglicana commendabilis sit illa consideratione, qua citius repræsentatur nostris aspectibus adoranda. . . . ." Lib. 3, tit. 26, p. 248.

The accuracy of this comment of Lyndwood as to what was the practice in England receives confirmation from the representations of a canopy on one of the Peterborough seals (3 Rock's Church of Our Fathers, p. 204), and of the canopy over the high altar in the cathedral of Durham, which is thus described:—"Within the said quire, over the high altar, did hang a rich and most sumptuous canapie, for the Blessed Sacrament to hang within it, which had two irons fastened in the French peere, very finely gilt, which held the canapie over the midst of the said high altar (that the pyx did hang in it, that it could not move nor stir)," &c., &c.: see Ancient Monuments, Rites, &c., of Durham, p. 6 (Surtees Society, 1842) (1), and 3 Rock's Church of Our Fathers, pp. 206–7, which contains a representation of this canopy.

(1) "A description or briefe Declaration of all the Ancient Monuments, Rites, and Customes, belonginge or being within the Monastical Church of Durham, before the Suppresion, written in 1593." Edited by the Surtees Society, 1842.

Again, one of the demands of the Devonshire rebels, in Edward VI.'s time (A.D. 1549) was: "We wil have the sacrament hang over the high altar, and there to be worshipped, as it was wont to be."—Strype's Life of Cranmer, appendix, p. 97. (1)

Again, Dr. Harding, in his celebrated controversy with Bishop Jewel (A.D. 1564), in the ninth article of the controversy, which is headed, "Of the Reverent Hanging-up of the Sacrament under a Canopy," says: "If M. Jewel would in plain terms deny the reservation and keeping of the blessed sacrament, for which purpose the pix and canopy served in the churches of England, as of the professors of this new Gospel it is both in word and also in deed denied; . . ." (the Works of Bishop Jewel, edited by the Parker Society, 1857, vol. ii. p. 553). Again, Dr. Harding says: "Whereto we say that, if he, with the rest of the sacramentaries would agree to the keeping of the sacrament, then would we demand why that manner of keeping were not to be liked. . . . In other Christian countries, we grant, it is kept otherwise, under lock and key, in some places at the one end or side of the altar, in some places in a chapel builded for that purpose, in some places in the vestry, or in some inward and secret room of the church, as it was at the time of Chrysostom at Constantinople. . . . Thus in divers places diversely it hath been kept, everywhere reverently and surely, so as it might be safe from injury and villany of miscreants and despisers of it. The hanging-up of it on high hath been the manner of England, as Lyndwood noteth upon the Constitutions Provincial; on high, that wicked despite might not reach to it; under a canopy, for shew of reverence and honour:" Works of Bishop Jewel, vol. ii. p. 555.

The above citations shew that the altar canopies introduced into England under Archbishop Peckham's constitution, and in general use here prior to and at the time of the Reformation, were over the high altar, and in 3 Rock's Church of Our Fathers, p. 208, it is stated "that the first wooden or stone tabernacle" (and it was of such materials that the small tabernacles were at the time made) "resting on the altar seen in this land was put up in Queen Mary's reign." Altar canopies in England appear prior to

(1) Memorials of Thomas Cranmer, sometime Lord Archbishop of Canterbury, by John Strype, vol. ii. p. 815, ed. 1840.

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the Reformation to have been composed principally of some stuff or silken material, and so in Italy until the seventeenth century.

The altar canopy over the high altar under the dome of the cathedral church of St. Peter's in Rome is said to have been the first baldacchino constructed in Western Europe of durable material. It is described by Viollet-le-Duc, vol. iv. p. 508, Dictionnaire Raisonné de l'Architecture Française du XI^e^ au XVI^e^ Siècle. See also Dictionnaire Historique d'Architecture, by M. De Quincy, vol. i. p. 149, sub voce "Baldaquin;" Rock, Hierurgia, p. 506.

It may be here observed that by ancient custom canopies or baldacchinos are in some countries carried over personages of dignity on state occasions as a mark of respect and honour. Thus a canopy is borne over the sovereign of this country during a part of the ceremony of the coronation. For the like purpose a baldacchino is carried over the pope, over cardinals, and over Roman Catholic bishops, in processions. In the Rituale Romanum (p. 34, ed. 1834) it was ordered that a baldacchino should be carried over the host when conveyed to sick persons (1), and on the feast of Corpus Christi, instituted A.D. 1264, by Pope Urban IV. (Cæremoniale Episcoporum, p. 377), for the special adoration of the consecrated wafer, a baldacchino was ordered to be prepared to be carried over the sacrament.

Baldacchinos are, therefore, with significancy and with consistency erected over the altars of Roman Catholic churches "for honour" (as Dr. Harding, in his controversy with Bishop Jewel, says) "of that blessed sacrament:" Works of Bishop Jewel, vol. ii. p. 557. So much for the historical view of the case.

I will now proceed to consider it in its legal aspect, and the first question that suggests itself to the judgment of the Court on this branch of the case is, whether the baldacchino or altar canopy proposed to be erected in St. Barnabas' (which was described by the counsel for the petitioners "as an extremely rich ornament, covering the whole of the altar, and, in fact, a small house under which the altar stood") is an ornament in the sense in which the term ornament is used in the rubrics of the Prayer Book, or

(1) See a representation of such a canopy or baldacchino, Vie Militaire et Religieuse au Moyen-Age . . . par Paul Lacroix, Paris, 1873, at page 320.

whether it is nothing more than an architectural adornment or decoration.

If it is a church ornament, unless it is such an ornament as comes within the provisions of the Ornament Rubric of 1662, or would be subsidiary to the services of our Church as prescribed by law, it is not competent to this Court to grant a faculty for its erection. The Ornament Rubric is in these words: "And here it is to be noted that such ornaments of the church and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by authority of Parliament, in the second year of the reign of King Edward the Sixth."

The construction to be put upon the words "ornaments of the church," and upon the words "by the authority of Parliament in the second year of the reign of King Edward the Sixth," as used in this rubric, has been under the consideration of, and has been determined by, the Judicial Committee of Her Majesty's Privy Council in the cases of *Westerton* v. *Liddell* (1) and *Martin* v. *Mackonochie*. (2) Their Lordships, in *Westerton* v. *Liddell*, said, "The term 'ornaments' in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but is used in the larger sense of the word 'ornamentum,' which, according to the interpretation of Forcellini's dictionary, is used 'pro quocunque apparatu seu instrumento.' All the several articles used in the performance of the services and rites of the Church are ornaments;" and further, that the word "ornaments," as used in the rubric of 1662, "is confined to those articles the use of which in the services and ministrations of the Church is prescribed by the Prayer Book of Edward the Sixth." (1) Their Lordships in that case came to the conclusion that ornaments of the Church not prescribed by the first Prayer Book of Edward the Sixth, and which are not consistent with and subsidiary to the performance of the services of our Church, are prohibited by law. In these conclusions the Judicial Committee expressed its concurrence in *Martin* v. *Mackonochie*. (2)

(1) Special Report of the Cases of *Liddell*, by E. F. Moore. 8vo. London, *Westerton* v. *Liddell* and *Beal* v. 1857.

(2) Law Rep. 2 P. C. 365, 390.

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It seems to me that the ciborium, or altar canopy, as known and used in England at the time of the Reformation, was an ornament or article of church furniture within the meaning of the term "ornaments," as used in the rubric of the first Prayer Book of Edward the Sixth.

It contains all the characteristics of a church ornament, whether as regards its form, the materials of which it was constructed, its symbolical signification, or the use to which it was applied, to which I have already referred.

But as the baldacchino, or altar canopy, proposed to be erected is to be of marble or other durable material, and not of the materials used in the construction of the altar canopies in use at the time of the Reformation, this further question arises, whether a baldacchino, or altar canopy, of this description is equally an ornament with the old altar canopies within the rubric.

In the petition it was described as an architectural adornment for the east end of the church. This is an inaccurate description of it. For if the holy table were removed from underneath it, the baldacchino would be there without meaning. It never could seriously be proposed to erect a baldacchino over a vacant space in the middle of the chancel for the sole purpose of adorning the east end of a church. It must, therefore, be taken to be an erection in connection with the communion-table, and was so admitted by the counsel for the petitioners in argument.

If it is an erection in connection with the holy table, it must be either a structure so attached to the holy table as to form a part of it, or a structure separate from the holy table, but in connection with it. If it were taken as something attached to the holy table, so as to form part of it, the table with the baldacchino added to it would not be that decent communion-table required by the 82nd canon.

If it is not to be erected as attached to the holy table, but as a structure separate from it and yet in connection with it, it is obviously an ornament.

It was described by the counsel for the petitioners as an architectural adornment of the holy table. But, if the altar canopies in use in England before the Reformation were ornaments, there is no sufficient distinction, in my opinion, between the old canopies

and the baldacchino proposed to be erected, to take the latter out of the category of church ornaments. In form it is substantially the same, as it would project over and cover the whole of the holy table. It is suitable for the same purposes as the old altar canopies, and the circumstance of its being made of different materials does not, in my judgment, constitute a legal difference between them.

The fact of its being constructed of a durable material, and of its being immoveable, does not deprive it of the character of a church ornament; otherwise it would be in the power of any individual, by making a change in the material, to legalise an article of church furniture which had been excluded when made of different material. An altar or communion-table of stone, fixed to the building, would be equally a church ornament as a moveable communion-table of wood.

If the baldacchino is an ornament within the meaning of the rubric, the next question for consideration is whether it is one of these ornaments sanctioned by the first Prayer Book of King Edward VI.; and if not, whether it can be shewn to be of use as subsidiary to the services of the Church.

There is no mention or reference to altar canopies in the first Prayer Book of Edward VI. The only ornaments mentioned in the Communion Service of that book are the Lord's table, God's board, or the altar (as it is indiscriminately called), the corporas, paten, and chalice; and the direction in the rubric following the Prayer of Consecration, that the priest shall perform that ceremony "without any elevation or shewing of the sacrament to the people," (1) is inconsistent with the retention of an ornament, which was introduced into this country and used, as already shewn, for the purpose of exhibiting on high the reserved sacrament. The contemporaneous exposition of the law to be gathered from the authorities and practice supports this construction of the rubric. It appears, by North's Chronicle of the Church of St. Martin, Leicester (2), that, under the injunctions issued by Edward VI., in 1547, the

(1) See the Liturgies of King Edward the Sixth. Edited by the Parker Society, 1844, at p. 89.

(2) A Chronicle of the Church of S. Martin in Leicester during the reigns of Henry VIII., Edward VI., Mary, and Elizabeth. . . By Thomas North. London: Bell & Daldy, 1866.

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churchwardens and other influential persons in the parish removed and disposed of the altar canopy belonging to the church (at pp. 97, 102); and that, on the accession of Queen Mary, when the high altar in this church was re-erected, a yard and a quarter of red silk was purchased to cover the canopy over the sacrament (at p. 129).

The whole tenor of the discussion between Bishop Jewel and Dr. Harding, on the subject of altar canopies and the reserved sacrament, which took place in A.D. 1364, and which has been already referred to, confirms this view. Again, in A.D. 1559, Queen Elizabeth, by virtue of her supremacy, issued certain injunctions in matters ecclesiastical, by the 23rd of which directions are given for the taking away and destroying of all shrines, coverings of shrines, trindals, rolls of wax, pictures, paintings, and all other monuments of superstition (1); and, to see that this, amongst other injunctions, was complied with, certain commissioners were appointed. From a return made to these commissioners, in A.D. 1566, by the churchwardens of 150 parishes in Lincolnshire, which has been published in Mr. Peacock's Church Furniture (2), pp. 45, 62, 74, 80, 94, 101, 106, it appears that in several of the parishes canopies had been found and were removed by the churchwardens as monuments of superstition, indicating that at that time they were not deemed to be lawful church ornaments.

The Court was urged by the counsel for the petitioners to sanction the erection of the baldacchino for the purpose of giving greater dignity and honour to the holy table in the church of St. Barnabas; but the honour and dignity to be given to the communion-table, I take it, has been provided for by the rubrics and canons; and I hold that it is not within the province of this Court to issue a faculty for the purpose of giving greater dignity or honour to the holy table than the simple dignity prescribed by the law.

After much consideration, I have come to the conclusion that the baldacchino, to authorize the erection of which a faculty is

(1) See Documentary Annals of the Reformed Church of England . . . By E. Cardwell, D.D., vol. i. at p. 221.

(2) English Church Furniture, Ornaments and Decorations, at the Period of the Reformation, as exhibited in a List of the Goods destroyed in certain Lincolnshire Churches, A.D. 1566. Edited by Edward Peacock, F.S.A. London: Hotten, 1866.

prayed, is a church ornament within the meaning of the rubrics; and, as it is not prescribed by the rubrics, nor can be regarded as in any way necessary or subsidiary to the performance of the services of the Church, I decline to order the faculty to issue.

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It is unnecessary for the Court, having regard to the ground on which it has deemed this application to be inadmissible, to consider the appeal to its discretion.

I am of opinion that Mr. Bowron is entitled to costs, and I condemn the petitioners in costs, excepting in the costs of those affidavits filed by him which do not bear on the legal question. (1)

Proctor for petitioners: *Brooks.*
Proctors for Mr. Bowron: *Moore & Currey.*

[IN THE CONSISTORY COURT OF LONDON.]

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July 20.

THE VICAR AND CHURCHWARDENS OF TOTTENHAM *v.* VENN AND ANOTHER.

Faculty—Alterations in Church—Faculty granted without the Consent of a Majority of Vestry.

On an application for a faculty, to authorize alterations in a parish church, made on behalf of the vicar and one of the churchwardens of the parish, it appeared that although the major part of those parishioners who were members of the Church of England were in favour of the application, the majority of the vestry, composed principally of parishioners not members of the Church of England, was opposed to it. The Court, in granting a faculty to authorize some of the proposed alterations, held, that although it might be fairly influenced by the vote of the vestry in relation to alterations likely to affect the architectural appearance of the church or the convenience of the public, yet it was bound in matters connected with the comfort and convenience of those who attended the church to give greater weight to the opinion of the majority of those parishioners who were members of the Church of England.

THIS was an application on behalf of the vicar and one of the churchwardens of Tottenham in the diocese of London to decree a faculty authorizing alterations in and additions to the parish church of Tottenham. Mr. Venn and Mr. Fox, two parishioners, appeared to oppose the application. Evidence was adduced to

(1) These affidavits related to the mode of conducting divine service in the Church of St. Barnabas, Pimlico.

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prove that the major part of the parishioners who were members of the Church of England were in favour of the application, and that the vestry had decided against the proposed alterations by a considerable majority. The facts sufficiently appear from the judgment.

Feb. 2. *Dr. Deane, Q.C.*, and *W. G. F. Phillimore*, for the petitioners.

Dr. Spinks, Q.C., and *Dr. Middleton*, for the opponents.

Cur. adv. vult.

March 25. DR. TRISTRAM. This is an application to the Court to decree a faculty authorizing extensive alterations in and additions to the ancient parish church of Tottenham.

The vicar and one of the churchwardens are the petitioners, and the application is supported by far the major part of those parishioners who are churchmen.

The alterations are: first, to raise the walls of the nave and the roof of the church, with the addition of clerestory windows; second, to make a slight addition to the nave and aisles at the east end of the church; and further, to extend the east end of the church by constructing a chancel and two vestries; third, to remove two galleries with the stairs leading up to the galleries; and fourth, to rearrange the sittings and repew the church.

The estimated cost of the proposed alterations is 4500*l.*, the whole of which will be provided by voluntary contributions. 2500*l.* of this sum has been already subscribed or promised, and there is every prospect that the remaining sum will be forthcoming when required.

The application for the faculty is opposed by Mr. William Venn and Mr. Thomas Fox, two parishioners, who are supported in their opposition by a considerable majority of the vestry.

The main grounds of their opposition are; first, that the church is as a whole an ancient and picturesque edifice, its ivy-clad tower being the oldest part of it, and that the raising of the roof, and especially the construction of a clerestory, would materially diminish the picturesque appearance and architectural beauty of the tower. Secondly, that by the proposed alterations the number

of available sittings in the church would be rather diminished than increased, and that the alterations are unnecessary; thirdly, that the erection of the chancel, transept, and choir vestry, would interfere with certain footpaths passing through the churchyard, as well as with numerous monuments and graves.

The fact that the present application is in opposition to the recorded vote of the parish vestry is entitled to the consideration of the Court. The Court, however, in determining whether, in the exercise of its discretion, it ought to grant or refuse the prayer for the faculty in the whole or in part, is bound to take all the circumstances of the case into its consideration. It is the duty of the Court to consult not only the wishes of the majority of the present vestry, but also to look to the comfort and convenience of the parishioners who attend the services of their parish church: *Jackson* v. *Singer* (1); as well as to the interests of future parishioners.

It appears by the evidence that the majority in the vestry was composed principally of parishioners who are not members of the Church of England. The vote of a vestry so composed may fairly influence the Court in its decision in relation to the proposed alterations in so far as they may be supposed to affect the picturesque or architectural appearance of the church or the convenience of the public, by diverting paths through the churchyard. But in matters connected with the comfort and convenience of those who attend the church, the Court is bound to give greater weight to the opinion of the majority of churchmen in the vestry.

The opinion of the vestry that the raising of the walls and roof of the nave of the church, and that the construction of a clerestory would damage the picturesque appearance and architectural beauty of the church, and especially of the tower, is, beyond all doubt, in accordance with the evidence produced in the cause. In addition to the opinion of non-professional parishioners, the opinion of the vestry on this point is confirmed by the affidavits of two architects who have carefully inspected the church, Mr. Donald Campbell and Mr. John Thomas Woodward, and the correctness of their judgment is not impugned by any architec-

(1) 37 L. J. (Eccl.) 9.

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tural evidence, and not even, I will observe, by Mr. Butterfield, the architect who prepared the plans and specifications for the proposed alterations, and who has made no affidavit in this cause. I therefore feel it my duty to reject this part of the application. So much of the plan as relates to taking down the galleries extending to the east end of the church, making a chancel and vestries, the re-arranging and re-pewing of the church, is supported by a considerable majority of churchmen in the vestry, as well as of churchmen in the parish.

The objection that these alterations do not increase the number of the available sittings would have weight but for the circumstances that very many (according to the vicar 200) of the present sittings are so placed and constructed that persons occupying them are unable to see or hear the officiating minister, and are also unpleasant, and even unhealthy. That such alterations are desirable appears to be the opinion of the Archdeacons of London and Middlesex, who have visited the church; and they are approved of by the Dean and Chapter of St. Paul's, who are patrons of the living. From the evidence before the Court I have come to the conclusion, that this part of the plan will greatly conduce to the comfort and convenience of those parishioners who desire to attend their parish church, by affording them more commodious and convenient sittings. The present church is without a chancel, and it appears to the Court that the erection of a chancel is most desirable.

I am, therefore, prepared to grant a faculty for so much of the plan as relates to the taking down the two galleries, the extension of the east end of the church, the making of a chancel and vestries, and the rearranging and repewing of the church.

The principal objection taken by the vestry to the extension of the east end of the church was, that it would necessitate the stopping up or diversion of certain ancient footpaths passing round the east end of the church, and which have long been used as public footpaths. Whether these paths are of such a description as to preclude the Court, under certain old decisions at common law, from diverting them for the purpose of providing better church accommodation does not clearly appear.

But the objection may be met in the manner suggested by Dr. Deane, that the faculty should not issue out of the registry until an order has been obtained from the Ecclesiastical Commissioners and two justices of the peace, under 59 Geo. 3, c. 134, s. 39, sanctioning the diversion of the footpaths. Upon such an order being obtained, this Court would be prepared to issue a faculty, or to insert a provision in the present faculty, upon a further citation being published, for the construction of a new footpath in such manner as would most conduce to the convenience of the parish.

As the defendants had, in the judgment of the Court, reasonable grounds for appearing in the interests of the parish before the Court on the present application, and have been successful on an important part of the application, I think they are entitled to their costs of appearing, and I will give directions to the Registrar as to the manner in which I think the costs should be taxed.

July 20. An application was on this day made to the Court to vary its sentence of the 25th of March, and it appearing on affidavit that the Ecclesiastical Commissioners, when applied to for the purpose, had refused to put in force the powers conferred on them under 59 Geo. 3, c. 134, s. 39, the Court, after hearing counsel for all the parties to the cause, decreed that a faculty for the diversion of the footpaths should issue without an order sanctioning such diversion having been obtained from the Ecclesiastical Commissioners and two justices, but not until a further faculty authorizing the petitioners to make a new footpath had been granted.

Proctor for petitioners: *Brooks.*

Proctor for defendants: *Crosse.*

1874
May 16.

THE AMERICAN AND THE SYRIA. (6795, 6799, 6800.)

Damage—Ship in Tow of Steam Vessel—Duty to keep out of Way of Sailing Vessel—Regulations for preventing Collisions at Sea, Articles 15, 19, 20—*Vessel towed liable for Negligence of the towing Vessel.*

The steamship *A.* found at a foreign port the *S.*, a screw steamship, totally disabled in her machinery. Both vessels belonged to the same owners, and the *A.* took the *S.* in tow and towed her into the English Channel. Both vessels were upwards of 1000 tons net register, and owing to the disabled condition of the *S.* the towage was of a difficult character. Whilst the *A.* was proceeding with the *S.* in tow in the English Channel at night a collision occurred between the *A.* and a sailing ship close hauled on the starboard tack. The damage done by the *A.* caused the sailing ship to sink, but before she sank the *S.* ranged up alongside of her and came into contact with her. The sailing vessel had seen on her starboard bow a light at the mast-head of the *A.* three or four miles off and had kept her course. Those on board the *A.* had seen the green light of the sailing ship about three quarters of a mile off and about four points on the port bow of the *A.*, and this was the first they had seen of the sailing ship: on this light being seen, or shortly after, the helm of the *A.* was put hard a-port. It was found as a fact that the *A.* had not a proper look out, and that the *A.*, if she had adopted proper measures in time, might have avoided the collision:—

Held, that it was the duty of the *A.* to keep out of the way of the sailing ship, and that she was to blame for the collision:

Held also, that the vessels *A.* and *S.* must be considered as both liable to be condemned in damages occasioned by the collision.

Rep. 26 P.C. 127

THIS was a consolidated cause of damage instituted on behalf of the owners of the late ship *Aracan*, and of her master and crew, against the steamship *American*, and against the steamship or vessel *Syria*, and against the Union Steamship Company, Limited, of Southampton, the owners of the said steamships *American* and *Syria*, the defendants in this cause intervening.

The following were the material allegations in the petition:—

1. Between 10 p.m. and 11 p.m. on the 8th of March, 1874, the ship *Aracan*, of 788 tons register, manned by a crew of twenty-four hands all told, whilst on a voyage from London to Hong Kong with a general cargo, was in the English Channel off Portland.

2. The wind at such time was about west-south-west, a moderate breeze, the tide was about two hours flood, and of the force

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of about a knot or a knot and a half per hour, and the weather was fine, and there was moonlight, and the *Aracan* was close hauled by the wind on the starboard tack, and sailing at the rate of about five or six knots per hour, and heading about south. Her proper regulation side-lights were duly exhibited and burning brightly, and a good look-out was being kept.

3. At such time a bright light, which proved to be a masthead light of the above-named steam-vessel *American*, was seen at the distance of several miles from the *Aracan*, and bearing about four or five points on her starboard bow, and some time afterwards the red light of the *American* and the red light of the above-named steam-vessel *Syria*, which proved to be in tow of the *American*, were also seen. The *Aracan* was kept close hauled by the wind on the starboard tack, in the expectation that the *American* and *Syria* would take proper measures for keeping out of the way of the *Aracan*, but, instead of so doing, the *American*, with the *Syria* in tow, came on and caused immediate danger of collision; and although the helm of the *Aracan* was put hard a-port, the *American* with her port side came into collision with the stem and port bow of the *Aracan*, and slewed the *Aracan* round with her head towards the eastward, and the *Syria* struck the *Aracan* on her port side, and so much damage was done to the *Aracan* that she foundered with her cargo and certain private effects of her master and crew. Her master and crew were saved by getting on board the *Syria*.

4. The said collisions and the losses of the plaintiffs consequent thereon were occasioned by the negligent and improper navigation of the *American* and *Syria*, or by the negligent and improper navigation of the *American*.

5. The said collisions were not in any way occasioned by any negligence on the part of those on board the *Aracan*.

The answer of the defendants was in substance as follows:—

1. Shortly before 10.20 p.m. of the 8th of March, 1874, the screw steamship *American*, of 1356 tons net register tonnage, propelled by engines of 320-horse power and navigated by Edward George Baynton, her master, and a crew of sixty-eight hands was in the English Channel, off Portland, which bore north by west, and was distant about sixteen miles, proceeding on

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a voyage from the Cape of Good Hope to Southampton, laden with a general cargo of merchandise, and having in tow the screw steamship *Syria*, of the burthen of 1959 tons gross register, which was disabled in her machinery.

2. The wind at this time was about west, the weather was fine, but dark, and there was a light haze on the water. The tide was flood, of the force of between one and two knots an hour, and the *American* was proceeding under steam only, steering east by north half north, and making about five knots an hour, with the Admiralty regulation lights, to wit, two bright white masthead-lights, placed vertically, about nine feet apart, upon the fore top-gallant stay (to indicate that she was towing another vessel), a green light on the starboard side, and a red light on the port side, all of which were duly exhibited, and burning well and brightly. The *Syria* also had a green light on her starboard side, and a red light on her port side, both also duly exhibited, and burning well and brightly. A good look-out was being kept on board both the above-named vessels.

3. In these circumstances, and whilst the *American* was thus proceeding, the green starboard light of a vessel (which afterwards proved to be the *Aracan*) was seen bearing about four and a half points on the port bow of the *American*, and at the distance of about three-quarters of a mile off. The helm of the *American* was then ported and put hard a-port, but the *American*, having the *Syria* in tow, only a slight alteration could be made in her course.

4. The *Aracan* was on the starboard tack, and as she approached the *American*, she improperly deviated from her course, and ran into and struck her upon the port side, just before the main rigging, and did her considerable damage. The *Aracan* then fell to starboard of the *American*, and the *Syria* ranged a-head, and shortly afterwards the *Aracan*, with her port side, came into contact with the stern of the *Syria*.

5. The master and crew of the *Aracan*, were, by means of the boats of the *Syria*, safely got on board the latter vessel, and conveyed to Southampton.

6. The *Aracan*, whilst approaching the *American*, before the collision, improperly starboarded her helm.

7. The *Aracan*, prior to the occurrence of the said collision, did not duly and properly port her helm.

8. The said collision, and the losses and damages consequent thereupon, were caused by the negligence of those on board the *Aracan*, and by their improper navigation of that vessel.

9. No blame in regard to the said collision is attributable to those in charge of the *American* or *Syria*, and the said collisions are, so far as they are concerned, the result of inevitable accident.

10. Save as herein appears, the defendants deny the truth of the statements contained in the plaintiffs' petition.

On the 15th, 16th, 17th, and 18th of April the cause was heard. Evidence was given on behalf of the defendants, from which it appeared that the *American*, on her way home from a foreign voyage, called at Ascension Island, where she found the *Syria* totally disabled in her machinery. The *Syria* was a screw steam vessel of 1495 tons net register. The *American* took the *Syria* in tow at Ascension to bring her home to England, and proceeded with her until the time of the happening of the collision in question. Owing to the great length and weight of both ships, and the difficulty of steering on board the *Syria*, the service was of a difficult character. The ships were connected by four chains and hawsers, with a long scope intervening, and the length occupied from the bows of the *American* to the stern of the *Syria* was nearly a quarter of a mile.

The substance of the rest of the evidence sufficiently appears from the judgment.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs, contended that it was the duty of the *American* and *Syria* to keep clear of the *Aracan*: *The Warrior* (1); *The Cleadon* (2); *The Arthur Gordon*. (3)

Milward, Q.C., and *G. Bruce*, for the defendants. Under ordinary circumstances it may be the duty of a steamship having a vessel in tow to keep out of the way of a sailing ship, but in the present case the *Syria* was disabled in her machinery, and it was not possible for the two steamships to keep out of the way of the *Aracan*. The present case falls within Art. 19 of the "Regula-

(1) Law Rep. 3 A. & E. 553. (2) 12 Moo. P. C. 92.
(3) Lush, 270.

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tions for Preventing Collisions at Sea," which provides that due regard must be had to any special circumstances which may exist in any particular case, and Article 15 therefore cannot be strictly enforced. The *American* carried towing lights to indicate that she had a vessel in tow. At the time *The Arthur Gordon* (1) was decided there were no provisions in force with reference to towing lights: *Huntley* v. *Palmer*. (2) Article 20 of the "Regulations for Preventing Collisions at Sea" made it obligatory upon the sailing ship to keep out of the way.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. This is an important case of collision between two, if not three vessels, that is to say, between the ship *Aracan*, of 788 tons register, which came into collision with the screw steamship *American*, which screw steamship was towing a disabled screw steamship called the *Syria*, and the action is brought in this Court by the *Aracan* against both vessels.

The collision took place between 10 and 11 o'clock at night on the 8th of March in this year, off Portland, in the English Channel, and the direction of the wind is variously stated from W. to W. S. W. All the vessels carried their proper lights, the *American* carrying two masthead lights, according to the rule, which prescribes that a vessel towing another shall carry such lights.

The parts of the vessels which came into contact were the port side of the *American* and the stem and port bow of the *Aracan*, and the port side of the *Aracan* and the starboard side of the *Syria*, according to the statement on behalf of the *Aracan*. According to the statement on behalf of the *American*, the bowsprit of the *Aracan* came into contact with the engine-room skylight of the *American*, and then the stem of the *Aracan* struck the *American* on the port side just before the main rigging, and no doubt that is the place where the main blow was struck; the port side of the *Aracan* afterwards came into contact with the stern of the *Syria*.

Now the *Aracan* was close hauled on the starboard tack, and she says that she saw the *American* four or five points on her

(1) Lush. 270. (2) Mitchell's Mar. Reg. 1871, p. 145.

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starboard bow, that is to say, she saw first of all a masthead light, one only, that of the *American* four or five miles off, if not more, and four or five points on her starboard bow, and afterwards she saw two red lights, that of the *American*, the towing vessel, and that of the *Syria*, the towed vessel. She says that, in expectation that the *American* and *Syria* would take the proper course in keeping out of her way, she, the *Aracan*, executed no manœuvre at all until just before the collision, when she put her helm hard a-port in order to avoid the violence of the blow. Within a short time after the collision, forty minutes, I think, according to the evidence, she foundered with her cargo.

The *American's* narrative is, that she being a very large steam vessel of nearly, I think, 1400 tons net register, and the other, the *Syria*, being nearly 2000 tons gross register, had towed the *Syria*, which was entirely disabled owing to an accident which had happened to her screw, all the way from Ascension Island, that the towing was a work of considerable difficulty and anxiety, owing to the *Syria* being perfectly unmanageable, or at least answering her helm with very great difficulty. The *American* says that she saw the green light of the *Aracan* about four and a-half points on her port bow, and at the distance of three-quarters of a mile, and she ascribes the collision to two causes—first of all, that the *Aracan* improperly starboarded her helm and so caused the collision; and secondly, that the *Aracan* did not, prior to the collision, duly and properly port her helm, as it is suggested it was her duty to do.

Now, I will take the last objection first, because it carries a question of law which has undergone some discussion in this case. The question is, whether a steamer in tow of another is or is not subject to the "Regulations for Preventing Collisions at Sea," which were passed and made binding by the Act of Parliament in 1862. Now, the 1st article defines what shall be considered a steamship, and it says that "in the following rules every steamship which is under sail and not under steam, is to be considered a sailing ship, and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam," and the 4th article, it is observed, provides for steamships towing other vessels, and says that "steamships when towing other ships shall carry two bright

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white masthead lights vertically in addition to their side lights, so as to distinguish them from other steamships. Each of these masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry." Therefore, a steam vessel towing another was in the contemplation of those who drew up these rules, and the 15th article says: "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." The 19th article says that "in obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." And the next article—the 20th—is, "Nothing in these rules shall exonerate any ship or the owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Now, first of all, I am clearly of opinion that the effect of these rules is to place a steamship towing another vessel in the same category, speaking generally, as other steamships, that is to say, that the fact of her towing another vessel does not exempt her from the obligation otherwise imposed upon her by these rules. That, I think, was in substance my decision in the case of *The Warrior* (1) which has been referred to, and to that decision I adhere. Indeed, the learned counsel for the *American* in this case did not contend that the mere fact of a steamship being in the act of towing another exempted her from the obligation of these rules, but it was said and contended with great force that the 19th and 20th articles taken together shew that when there were special circumstances it was the duty of the vessel, which otherwise ought to keep her course, to execute a proper manœuvre herself, and it was contended, as a matter of fact, that those special circumstances existed in the present case, and that is the first point to be determined, whether there were in this case such special

(1) Law Rep. 3 A. & E. 553.

circumstances as required the vessel close-hauled on the starboard tack not to keep her course but to execute some other manœuvre.

Now I have conferred with the Elder Brethren of the Trinity House upon this, as upon the other points of the case, and speaking now of the time when these vessels were first seen, that is to say, when the *American* was seen at a distance of from four to five miles, or from three to four miles off by those on board the *Aracan*, speaking first of all of that state of things, I am of opinion that there were no special circumstances which rendered it the duty of the *Aracan* to port her helm or to starboard her helm, but that it was her duty, according to the provisions of the article, to keep her course. It is quite true that she must be taken according to the evidence to have been aware that at that distance these two vessels were going somewhere in the direction of E. N. E., while she was going in the direction of S.; she must be taken to have been aware of that fact, and that the one was in tow of the other, at the distance which I have mentioned, of from three to four miles; but it was, in the judgment of the Court, not incumbent on her upon that ground to do otherwise than to obey the rule which required a close-hauled starboard tacked vessel to keep her course.

The question, therefore, which really remains to be considered in this case, and which is the one which has from the first appeared to me of principal importance is, whether the other averments or objections set up in the answer of the *American* be well founded in fact, or not, namely, that the *Aracan* did not keep her course, but starboarded her helm.

Now that is the question upon which the evidence is, as we would expect it to be, extremely conflicting, though I do not think there is any reasonable doubt upon which side, when carefully examined, the evidence preponderates. There is very strong and positive evidence given on behalf of those who were on board the *Aracan* that almost at the very time of the collision her sails were shaking, and that she had continued on her starboard tack. There is very strong evidence also that her port side was stove in, though it is true that the *Aracan* herself having unfortunately perished, the Court is deprived of the information which a distinct inspection of the vessel would otherwise have given upon this point. On the other side it is contended generally that it was the

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starboard side that was stove in more than the port side, though the port side was also injured, and that from the first to the last the evidence produced on the part of the *American* is to the effect that her sails were "ramp full," as the expression is, and that in fact she had starboarded according to the averments in the answer, and thereby produced the collision.

Now there are two witnesses in this case on whom, in this conflict of evidence, the Court thinks it is justified in placing considerable reliance. There were two invalided soldiers on board the *American*, from the Ashantee Coast, who were coming home, and who were on deck at the time of this collision; and though it is perfectly true, as remarked by the counsel for the *American*, that if there were any question of navigation or nautical practice or science, their opinion might be very little worth having, that observation does not appear to me to have much weight in the present instance, when the question is, whether they did or did not see the red light of the *Aracan* before the collision. If they did see this red light of the *Aracan*, if it was visible to those on board the *American* before the collision, and they did see it, then it would be very strong evidence to shew that the story told by the *Aracan* was true, and that she had not starboarded her helm at the time she was alleged by the *American* to have done so. And the Court has considered this question of evidence in conference with the Elder Brethren, and has arrived at a very clear conviction that there is no reason whatever to distrust the statement made by those two soldiers. They gave their evidence with great clearness and great precision, and apparently have no interest whatever in the result of this case; and they appear to me, as indeed they did also to the Elder Brethren, to be the witnesses of truth in this case. I have therefore arrived at the conclusion that the evidence preponderates in favour of the averment of the *Aracan*, that this collision was not produced by her starboarding her helm, but that she kept her course. Now I must observe also that the *American*, according to her own statement, only saw the green light of the *Aracan* at a distance of three-quarters of a mile. The *Aracan's* green light is proved to have been one of the best quality, and the night was one upon which it would be probable that the light would be seen at the distance

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required by the rules, namely, at two miles, certainly at a very considerably further distance than that of three-quarters of a mile.

I therefore arrive at this not unimportant conclusion, that if the look-out had been proper the green light of the *Aracan* would have been seen at an earlier time, and it would have been competent to the *American* to have executed the proper manœuvre for getting out of her way; but, more than that, even at the time when the green light is said to have been seen the first time, namely, at three-quarters of a mile distance, it appears to me, on looking at the evidence, and remembering the manner in which it was given by the witnesses, that there was a delay between the report of the look-out on board the *American* and the execution of any manœuvre on the part of those who had command of the *American* which contributed to this collision. I observe that Smith, who was stationed forward to look out, says he saw a ship's light, and he reported a light on the port bow, and it appears there was no answer to this first report, though, as he says, very soon afterwards he sung out a second time "green light on the port bow," and was answered "all right." I think, therefore, that not only was this green light not seen in proper time, and thereby the proper manœuvre not executed in proper time, but even when it was seen, there was a culpable delay between the report of it and the execution of a proper manœuvre.

Now, the Elder Brethren are of opinion, and this is a point upon which they are more competent to judge than I am, that the proper course for the *American* to have taken would have been to have slackened her speed and starboarded her helm, and so gone under the stern of the *Aracan*; and they are of opinion that she might very well have slackened her speed, going five knots, that there was no difficulty in her being still under control if she had slackened her speed, and that was the course she ought to have pursued. The accident, therefore, was certainly not inevitable, and might have been avoided if the *American* had taken the proper steps at the proper time.

I have also considered whether there were any special circumstances which required the *Aracan*, on her part, to execute any manœuvre whereby this collision might have been avoided, and I take it to be a sound principle of law, which cannot be too care-

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fully or uniformly applied to cases of this description, that the vessel which is ordered by the regulations to pursue a certain course has a right to presume up to the last moment that the other vessel will do her duty, and also observe the regulations; and it is quite clear that if the *American* had done her duty on this occasion the collision would not have happened.

I do not, therefore, think it necessary to inquire whether, by any possibility, something done on the part of the *Aracan* might or might not have avoided or lessened the evil of the collision, because I am satisfied that up to the last moment, in this case, she had a right to presume that the *American* would do her duty, and that if the *American* had done her duty there would have been no collision.

Therefore I pronounce the *American* alone to blame; I do not pronounce the *Syria*, but I pronounce the *American* to blame for the collision.

Butt, Q.C., having asked the Court to condemn both the *American* and *Syria* in the damages pronounced for, the question whether both the vessels were liable to be so condemned was reserved for further argument.

May 5. *Butt, Q.C.*, and *Clarkson* argued that the *American* having been engaged in the service of the *Syria* at the time of the collision, the *Syria* and the defendants, as her owners, were liable to the plaintiffs in respect of the collision, even if there was no actual negligence on the part of those on board the *Syria* occasioning or contributing to the collision: *Moreton* v. *Hardern*. (1)

Milward, Q.C., and *Bruce*. The relations existing between the *Syria* and the *American* were not those ordinarily existing between a ship and a tug boat. The *American* did not act under the control of the *Syria*, and the *Syria* cannot be held liable for damage occasioned by those who were not acting as her agents.

Butt, Q.C., in reply.

Cur. adv. vult.

May 16. SIR ROBERT PHILLIMORE. In this case I have

(1) 4 B. & C. 223.

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already pronounced the steamship *American*, which was towing a disabled steamship, the *Syria*, to blame for a collision with the *Aracan*. The question whether the *Syria*, the towed vessel, was also to blame stood over for consideration.

The exact point has, I think, not yet been decided, but the principle that two vessels in the relative positions of the *American* and the *Syria* constitute in intendment of law, at least so far as cases of collision are concerned, one vessel has been decided, and upon reflection I think this principle carries me a great way to the conclusion that the *Syria* is also to blame.

I should observe also that both the *American* and the *Syria* belonged to the same owners, and that both vessels came into collision with the *Aracan*, although the damage inflicted by the *Syria* was extremely trifling. In the case of *The Cleadon*, the Privy Council said: "The *Cleadon* being in tow of the steam tug, it is admitted in the case that she and the tug must be considered to be one vessel, the motive power being in the tug, the governing power in the vessel that was towed." (1) In the subsequent case of *The Arthur Gordon* (2) this judgment was referred to, and it was said: "Their Lordships never intended to lay down in the case of *The Cleadon* that a steam tug in charge of a ship must be considered as a free steamer," but the proposition as to the towing and towed vessels forming one vessel in a case of maritime tort does not appear to have been questioned.

The decision in the present case is, I am aware, of great consequence to the parties, inasmuch as it is probable (as I am informed) that the defendants, as owners of the *American* alone, under the exemption of limited liability, will not be obliged to pay the full amount of the damage inflicted upon the *Aracan*, and of course their additional liability as owners of the *Syria* will make a great difference in this respect.

It appeared to me at first sight that the fact that the towing vessel was a salvor and not a hired tug might make a difference in the application of the law, inasmuch as it might be contended that the governing power was not in the towed but in the towing vessel; but upon reflection I think this distinction cannot affect the case.

(1) 12 Moo. P. C. 92. (2) Lush. 270.

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Whether the governing power be in the towed vessel, as according to the judgment just referred to it would usually be, or whether it be in the vessel which was by towing performing an act of salvage—in either case, I think the two vessels must be considered as one. I must therefore pronounce the *Syria* also to blame for this collision.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitor for defendants: *Cooper.*

Aug. 6.

THE C. S. BUTLER. (6869.)

Damage—Appeal from County Court—Admission of Evidence—"Regulations for preventing Collisions at Sea"—River Lighter not bound to carry Lights—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 26.

A lighter of sixty tons burthen was proceeding under sail in the river Thames, above Gravesend, at night without any light being exhibited on board her, and came into collision with a steam vessel. In a suit instituted on behalf of the owners of the lighter to recover in respect of the damage done to the lighter by reason of the collision, it was proved that the lighter was ordinarily employed in the river, and was not a sea-going vessel:—

Held, that the "Regulations for preventing Collisions at Sea" did not impose upon the lighter any obligation to carry any light, and that the lighter was not to blame for having no light.

THIS was a cause of damage instituted in the City of London Court on behalf of the Corporation of Trinity House against the owners of the screw steamship *C. S. Butler*, for the recovery of damages arising out of a collision which occurred in the river Thames between that steamer and a ballast lighter owned by the corporation of Trinity House.

The cause was heard by the judge of the City of London Court, assisted by two nautical assessors, on the 11th of May, when witnesses were examined orally on behalf of the plaintiffs and defendants, but no notes of the evidence were taken. The judge of the City of London Court dismissed the suit with costs, but gave no reasons for his decision. Against this decree the plaintiffs appealed to the High Court of Admiralty. The proceedings

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in the City of London Court were duly transmitted to the registry of the High Court of Admiralty, but these proceedings did not afford any information concerning the evidence given at the hearing, or the grounds of the judgment.

July 16. On this day the appeal came on to be heard before the judge of the High Court of Admiralty.

Butt, Q.C., and *Dixon*, appeared on behalf of the appellants, and proposed to examine witnesses before the judge in court.

E. C. Clarkson, on behalf of the respondents, objected that the 26th section of the County Courts Admiralty Jurisdiction Act, 1868, allowing an appeal, did not give the Court of Admiralty jurisdiction to re-hear the cause. Even if the Court had power to re-hear the cause, it ought not to do so in a case where the appellants have neglected to follow the course pointed out by the 32nd rule of the "General Orders for regulating the practice and procedure of the admiralty jurisdiction of the county courts, 1869."

SIR ROBERT PHILLIMORE. I will hear evidence on the appeal, but I may say that I think it will be well that only those witnesses should be examined who were examined in the Court below.

A witness was then called on behalf of the appellants, who in evidence stated in effect that the lighter in question was a vessel of 60 tons burthen, and was employed in carrying ballast in the Thames; that he had served on board her for four years, during which time she had never gone below Gravesend; she had a standing mast, and carried a mainsail and foresail, and was decked fore and aft, and was sometimes propelled by oars, sometimes by sails, as occasion required; that it had never been the practice for her to exhibit any lights when under way; and that at the time of the collision, which occurred in the Thames near Woolwich in the early morning before sunrise, she was under sail, but had no lights of any kind exhibited.

On this evidence being given, the Court directed the question to be argued whether the lighter was to blame for not having any lights exhibited at the time of the collision.

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Butt, Q.C., and *Dixon*, for the appellants. The lighter never went to sea, and therefore the "Regulations for preventing Collisions at Sea" do not impose upon her any obligation to carry lights: *Ex parte Ferguson.* (1) The Conservators of the Thames have power to make bye-laws for compelling vessels to carry lights in the river (20 & 21 Vict. c. cxlvii. (The Thames Conservancy Act, 1857), s. 44); but they have not thought fit to make any bye-laws which require lights to be carried by any vessels except steam vessels. It is dangerous and illegal for a vessel to carry lights not required by law: *The Owen Wallis.* (2)

E. C. Clarkson. It is admitted that if any bye-law had been made by the Conservators of the Thames with reference to the carrying of lights by lighters, such bye-law would have been obligatory. But in the absence of any such bye-law, the "Regulations for preventing Collisions at Sea" must apply. The rules laid down by the Merchant Shipping Act, 1854, were held to apply to vessels navigating the Thames: *The Velocity* (3); and the "Regulations for preventing Collisions at Sea" apply as extensively as those rules. The ordinary rules of good navigation require that a vessel navigating a highway should exhibit some light. The case of *The Owen Wallis* (2) was an exceptional case. [He also referred to *The Malvina.* (4)]

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. This case comes before the Court in a very strange and unusual manner without evidence or judgment from the Court below. But a witness has been examined here, and on his examination questions of law are raised which I am asked to decide as preliminary to any question on the merits.

The first question of law is, whether this Trinity House lighter is bound to carry the regulation lights, prescribed by the order in council made in accordance with the Merchant Shipping Act Amendment Act, 1862, to be carried by certain vessels.

By the definition clause of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which is incorporated in the later Act, "ship shall include every description of vessel used in navigation not

(1) Law Rep. 6 Q. B. 280.
(2) Ante, p. 175.
(3) Law Rep. 3 P. C. 44.
(4) Lush. Adm. 493; 31 L. J. (P. M. & A.) 113.

propelled by oars." This definition is copied in the Admiralty Court Act, 1861. Taking into consideration the terms in the 3rd subsection of the 30th section of the Merchant Shipping Act Amendment Act, 1862, "to proceed to sea," and the judgment in *Ex parte Ferguson* (1), I am of opinion that the criterion as to whether a vessel falls under the category of "ship" mentioned in the Act, is, whether the vessel be one whose real habitual business is to go to sea; if so, though propelled by oars as well as sails, it is a ship within the meaning of the Act.

Upon the evidence before me it does not appear that this vessel does go to sea at all—though it has sails as well as oars. It does not therefore come within the meaning of the term "ship" in the statute.

The next question is, whether a vessel of this kind be subject to the rules laid down by the Thames Conservancy, and whether if so, there be any rule laid down by that body which renders the carrying of lights by this vessel obligatory by law.

There is certainly considerable difficulty in reconciling the statutable authority conferred on the rules and bye-laws of the Conservators of the River Thames with the statutable authority conferred on the "Regulations for preventing Collisions at Sea." The jurisdiction of the Thames Conservators extends from Cricklade to Yantlett Creek.

It never could have been the intention of the legislature to create rival and conflicting authorities on the subject of the navigation of sea-going vessels. It cannot be, for instance, that the Thames Conservators have a power, if they please to exercise it, of ordering a port-light to be carried on the starboard side of a ship coming from New York to London when she arrives within waters subject to their jurisdiction.

I think the only approach to a reasonable solution of the difficulty is to consider vessels navigating the River Thames to mean vessels whose navigation is confined to that river, and which do not go to sea.

I am of opinion, that this lighter is subject to the Thames Conservancy rules, but I cannot find any rule which orders her to carry a light.

(1) Law Rep. 6 Q. B. 280.

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I pronounce, therefore, that the vessel is not to blame for not carrying lights, and cannot on this ground be legally said to have contributed to this collision.

August 6. The case came on for further hearing, and the witnesses who had been examined in the court below were examined orally before the Court. The judge pronounced the *C. S. Butler* alone to blame for the collision.

Solicitors for appellants: *Symes, Sandilands, & Humphry.*
Solicitor for respondent: *Cooper.*

June 4.

[IN THE ARCHES COURT OF CANTERBURY.]

WALSH *v.* THE BISHOP OF LINCOLN.

Duplex querela—Pendency of Action of Quare Impedit—Concurrent Remedies—Election.

A writ was issued out of the Court of Common Pleas, in an action of quare impedit, against the Bishop of Lincoln at the suit of W., who claimed to be instituted to a living within the diocese of Lincoln, of which he was himself the patron. Whilst this action was proceeding W. instituted a suit of duplex querela in the Arches Court of Canterbury, calling upon the said bishop to shew cause why W. should not be instituted to the said living.

The Court, on motion on behalf of the bishop, directed that if W. did not elect to abandon the action of quare impedit within ten days, the suit of duplex querela should stand dismissed. See *Barton* v. *Ashton* (1 Lee, 460).

MARCH 12. *Benjamin Shaw* moved the Court, ex parte, to decree a monition in a suit of duplex querela to issue at the promotion of the Rev. Wm. Walsh, clerk, the vicar and rector of Great Tey, in the diocese of Rochester, monishing the Bishop of Lincoln to institute and induct the said Wm. Walsh to the rectory and parish church of Great Coates, in the diocese of Lincoln, vacant by the death of the Rev. Henry Houson, clerk, or to shew cause why he refused to do so, and inhibiting the said bishop from attempting anything to the prejudice of the said Rev. Wm. Walsh pending the business of the complaint. He stated that Mr. Walsh was himself the patron of the rectory of Great Coates, and that he had duly presented himself and had prayed the bishop of the

diocese to institute and induct him thereto, and that the said bishop had refused to do so.

[He referred to the *Bishop of Exeter* v. *Gorham*. (1)]

Sir Robert Phillimore decreed a monition to issue as prayed, subject to an affidavit to lead the monition being brought in stating the above facts. (2)

Accordingly an affidavit to lead the monition was subsequently filed: it was in substance as follows:—

1. I, William Walsh, clerk, am in priest's orders of the Church of England.

2. In the month of November, 1873, I being then the true and undoubted patron of the rectory of Great Coates, in the county and diocese of Lincoln, for that turn or vacancy, and well entitled to present or nominate a duly qualified person to be the rector thereof, did then duly present myself and pray the bishop of the said diocese to institute and induct me thereto.

3. I then forthwith applied to the said bishop for institution to the said rectory, and the said bishop did, by writing under his hand bearing date the twentieth of November, 1873, notify to me his refusal to institute me to the said rectory.

4. Lastly, I say that twenty-eight days at the least have expired since I first tendered my presentation or petition to the bishop, and that the bishop refused to grant me institution thereupon. (3)

On this affidavit being filed, the following monition with intimation issued:—

I, Robert Joseph Phillimore, Knight, D.C.L., Official Principal of the Arches Court of Canterbury, to all and singular, &c. It has been declared to us in our office aforesaid, on the behalf of the Reverend William Walsh, clerk, that he is aggrieved as his complaint to us sheweth, inasmuch as although the rectory of the parish church of Great Coates, in the county of Lincoln and diocese of Lincoln and province of Canterbury, has been for the last six months or thereabouts and still is vacant and without a rector by the natural death of the Reverend Henry Houson, clerk, the late incumbent thereof; and although the said Reverend William Walsh, clerk, was and is rightly and duly presented to the said vacant rectory and parish church of Great Coates aforesaid by himself, the true and undoubted patron of the said rectory for that term or vacancy (he being duly entitled to present a duly qualified spiritual person thereto), or (being so entitled) has duly prayed the said bishop to admit, institute, and induct him thereto by reason of his being so entitled; and although the said Reverend William Walsh exhibited and tendered in due time and place his letters of presentation or petition in that behalf to the said Bishop of Lincoln, and hath claimed to be instituted and invested

(1) Special Report by Moore, London, 1852.

(2) *Shaw* drew the attention of the Court to the 96th Canon, and submitted that as the monition contained an inhibition it should be signed by counsel. The Court expressed an opinion that it would not be irregular for him as a barrister-at-law to sign the monition.

(3) See Canon 95.

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in the said rectory and parish church, together with all its rights, members, and pertinents, according to the power, form, tenor, and effect of the aforesaid letters of presentation or petition, and that he be entrusted with the care and direction of the souls of the parishioners thereof, and that he be inducted into and charged with the real, actual, and corporal possession of the said parish church with all its rights and pertinents; and although the said Reverend William Walsh, clerk, has sought and demanded with all earnestness and humility more than once, or at least once, that right and justice be done to him in the premises by the said Bishop of Lincoln; and although he has offered himself ready and prepared to make the subscriptions, &c., as by law required in that behalf; and although the said Reverend William Walsh, clerk, was and still is capable and duly qualified as well by his private character, age, and learning, as also by the purity, probity, and integrity of his life, to be instituted into and invested in the said church, with all its rights, members, and pertinents, and for such and as such he was and still is called, held, considered, accounted, and reputed to be openly, publicly, and notoriously, nevertheless the said Bishop of Lincoln, who was well acquainted with all and each of the premises, and who ought therefore in virtue of the premises to have instituted the aforesaid Reverend William Walsh, clerk, into the rectory and parish church aforesaid, declined and refused to do right and justice in that behalf, or unjustly and unrighteously (saving always all due reverence and honour) has delayed and still delays so to do to the no small prejudice and inconvenience of the said Reverend William Walsh, clerk, the party complaining: Wherefore the said Reverend William Walsh, clerk, has humbly prayed us that we would be pleased to grant him, so far forth as is fitting, a remedy in this behalf according to the exigency of the law. And whereas we are willing to extend our aid to the said party complaining to us as aforesaid, We do therefore hereby authorize, empower, and strictly enjoin and command you jointly and severally to monish or cause to be monished peremptorily (so far as is befitting his honour and reverence) the Bishop of Lincoln (whom we do so monish by the tenor of these presents), that he within the space of eighteen days from the service of such monition, and of which we assign him six for a first monition, six for a second, and six for the last and peremptory monition, institute and invest the said Reverend William Walsh, clerk, to and in the rectory and parish church aforesaid, with, &c., and also cause the said Reverend William Walsh, clerk, to be inducted into the real, actual, and corporal possession of the same, and also to minister or cause to be ministered to the party complaining, in all and each of the premises and whatever concerns them, as to the law and justice of the case shall appertain, otherwise, that if at the expiration of the aforesaid eighteen days the said Reverend William Walsh, clerk, be not instituted into and invested in the said rectory and parish church aforesaid, and if right and justice shall not have been administered to him in that behalf, you cite or cause to be cited peremptorily (with all due reverence) the aforesaid Bishop of Lincoln to enter an appearance personally, or by his proctor duly constituted in the registry of our said Court, on or before the sixteenth day after he shall have been served with these presents, and shew a reasonable and lawful cause, if he have any, why (the right having devolved upon us through such his refusal and denial of justice) the said Reverend William Walsh, clerk, ought not to be rightly, lawfully, and canonically instituted into the said rectory and parish church, with, &c., and inducted into the real, actual, and corporal

possession of the same, and justice be administered to him the aforesaid Reverend William Walsh, clerk, in the premises by us and by our authority in due course of law (justice so requiring), and that you intimate or cause to be intimated peremptorily to the aforesaid Right Reverend Father in God, Christopher, by Divine permission Lord Bishop of Lincoln (whom we do by the tenor of these presents so intimate), that if he do not appear at the aforesaid time and place, or appearing do not set forth a reasonable and lawful cause to the contrary, we, our surrogate, or some other competent judge in this behalf, will proceed, and intend to proceed, to institute the said Reverend William Walsh, clerk, to the rectory and parish church aforesaid (the absence, or rather the contumacy, of the said Bishop of Lincoln notwithstanding). We, therefore, command you as above to inhibit or cause to be inhibited peremptorily the aforesaid Bishop of Lincoln, or his vicar-general in spirituals, and all others in general whom we by these presents do inhibit, that they or either of them do not, pending the business of this undiscussed complaint, attempt to make, or cause to be attempted or set forth anything to the prejudice of the party appealing or complaining in and about the premises, or anything respecting them, under pain of the law. And what you shall do in the premises you shall duly certify in the registry of our said Court with these presents, &c. (1)

The monition was duly served on the 7th of April, and on the same day an appearance in the suit was entered on the part of the Bishop of Lincoln, and a libel prayed.

An action of quare impedit, in which the Bishop of Lincoln was the sole defendant, had been commenced by Mr. Walsh in the Court of Common Pleas, on the 15th of January, 1874, and was pending at the time the monition was served; and accordingly the proctor for the bishop, on entering an appearance as above, also left in the registry, and served on Mr. Walsh's proctor, a notice of motion to the effect that the Court would be moved to order that Mr. Walsh, the plaintiff, should within six days elect whether he would proceed in this suit or in the action of quare impedit brought by him in the Court of Common Pleas, and that all proceedings in this suit should be stayed till he had made his election as aforesaid, and in the event of his electing to proceed in this suit, that he should be required forthwith to abandon his said action of quare impedit, and in the event of his electing to proceed in the said action of quare impedit, that this suit might be dismissed with costs, and that the plaintiff might be condemned in the costs of this motion.

In support of the motion for which notice had thus been given,

(1) The monition was sealed with the seal of the Court, and was signed thus: "Benjm. Shaw, Jno. Shephard, Regr."

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a joint affidavit made by the proctor for the Bishop of Lincoln and the attorney employed to defend the action of quare impedit on his behalf, was filed.

It appeared from this affidavit that the writ in the action of quare impedit was issued on the 15th day of January, 1874, and that the Bishop of Lincoln appeared thereto on the 19th day of January, 1874, and that the attorney for the plaintiff had since declared in the action, and the bishop had pleaded thereto, and that demurrers to the defendant's pleas stood for argument on the 4th day of May then next.

The affidavit also stated that the plaintiff in the said action of quare impedit was the same person as the plaintiff in this suit, and that the said action and this suit related to the same matter, and had for their only object the putting of the plaintiff in possession of the said rectory of Great Coates, and that the Bishop of Lincoln was unnecessarily and improperly harassed by the concurrent prosecution of the said action and of this suit.

May 13. *W. G. F. Phillimore*, on behalf of the Bishop of Lincoln, moved pursuant to the terms of the notice of motion. (1)

An application is made to this Court and not to the Court of Common Pleas, as the common law action was commenced on the 15th of January and no proceedings were taken here till the 12th of March, when a plea of lis alibi pendens could not have been pleaded in the ordinary course. It was, moreover, uncertain whether the Court of Common Pleas would take cognisance of a suit in this Court.

The result of the proceedings in the present case if the plaintiff succeeds will be that he will be instituted and inducted in and to the rectory and parish church of Great Coates; and, similarly, if the verdict in the action of quare impedit is in favour of Mr. Walsh, the same consequences will result. The principle of not allowing a defendant to be harassed by a multi-

(1) The demurrer book in the action of quare impedit, and a copy of a bill filed in the Court of Chancery to prevent the Bishop of Lincoln instituting to the living of Great Coates any other clerk than Mr. Walsh were referred to during the argument: the facts therein stated sufficiently appear from the judgment.

plicity of suits is borne out by common law authorities. (1) So, also, it has been held at common law, that of two actions of quare impedit brought substantially to try the same right, one will be ordered to be abated, and that even though slight immaterial variances may exist between them: Bacon's Abr. tit. Abatement (m), vol. i. pp. 22, 24, ed. 1832; Comyn's Dig. tit. Abatement (H. 24) vol. i. p. 116; Mallory, Quare Impedit, pt. ii. p. 67-73.

Indeed, in certain cases at common law, a plaintiff will be made to elect with which of two pending actions he will proceed, though it is true he will not be compelled to make election in every case, for it is not always that the superior courts of common law will take cognisance of the proceedings of other Courts. The practice of the Court of Chancery has always been to compel a plaintiff proceeding both at law and in equity at the same time and for the same matter to elect, and a similar election will be required even in a case where one of two sets of proceedings for the same object is in a foreign Court: Daniell's Chancery Practice, vol. i. p. 718; *Barker* v. *Smark.* (2) That a similar practice prevails in the Admiralty Court appears from the case of *The Lanarkshire.* (3) In the former Prerogative Court of Canterbury the same principle has been applied: *Brotherton* v. *Hellier* (4); *Pearson* v. *Gamon.* (5) It is the invariable practice of all Courts in this country, so far at least as they are not restrained by technical rules, to prevent a plaintiff from unjustly vexing the same defendant by a double litigation.

Benjamin Shaw opposed the motion on behalf of the plaintiff. No precedent can be found where a plaintiff has been put to his election in a case analogous to the present. It must be remembered that Mr. Walsh is suing in the Common Pleas in his capacity of patron of the living of Great Coates, and for his rights of patronage, but that he appears here in another capacity, and as presentee complains that the bishop has unjustly refused to institute him. It is true that it may be competent for this Court, if not prohibited, to entertain the question of patronage; but it cannot be

(1) See Viner's Abridgment, tit. Abatement (C), on the case of the *Mayor of London* v. *B.*

(2) 3 Beav. 64.

(3) 2 Eccl. & Adm. (Spinks) 189.

(4) 2 Lee, 131.

(5) 2 Lee, 268.

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said with truth that the rights in issue in both proceedings are the same.

It is not in every case that the Court of Chancery will compel an election between proceedings at law and in equity. The case of a mortgagee is an example to the contrary. A mortgagee may proceed in equity for a decree of foreclosure and also bring an action at law on the covenant in the mortgage deed. Moreover, the cases referred to are none of them applicable, for either the proceedings were virtually the same, or the object of the party proceeding could be as well obtained in one Court as in the other. In the present case, it is by no means clear that if Mr. Walsh is restricted to one alone of the two remedies open to him, complete justice will be done. The questions raised by him in the Court of Common Pleas are not the same questions which it may be competent for him to raise here, and in pursuing the remedy he is entitled to in this Court the opinion of the Court can be taken on issues which could not be discussed elsewhere. In the Court of Common Pleas, the question whether Mr. Walsh, as temporal patron, was unjustly disturbed by the bishop can be clearly settled, whilst it may be a question of grave doubt whether, if such question should be entertained here, a prohibition might not go on the ground that this Court ought not to take cognisance of any plea of freehold.

In this Court, on the other hand, the personal fitness of Mr. Walsh to be instituted, and the question whether, in refusing to institute him, the Bishop of Lincoln exercised a right discretion, can be tried. But in an action of quare impedit, the Court of Common Law will not interfere with any matter in the bishop's discretion, but will, if the clerk is alive, simply write to the bishop for his certificate. Thus, in the action of quare impedit which was brought by the Crown against the Bishop of Exeter in 1850, and arose out of his refusal to institute Mr. Gorham to a living in his diocese, the question of heresy could not be determined by the common law judges, but a rule issued to the archbishop to examine Mr. Gorham and certify the result of his examination to the Court: see *Reg.* v *Bishop of Exeter*. (1) In cases where more than one remedy is open to a plaintiff, and it is as doubtful as it

(1) 12 L. T. 348.

is in the present case whether if debarred from pursuing both he will not be deprived of some benefit the law would otherwise give him, he ought not on principle to be forced to abandon either.

Phillimore, in reply.

Cur. adv. vult.

May 22. SIR ROBERT PHILLIMORE. This is an application to the Court that, in a suit of duplex querela now pending before it, the plaintiff be ordered to make his election whether he will proceed in this suit, or in an action of quare impedit brought by him in the Court of Common Pleas. The ground of the application is, that in both suits substantially and really the question is the same, and that the defendant ought not to be harassed by a double litigation. Although the books are clear upon the point that the plaintiff is at liberty to institute a suit in this court technically called a duplex querela, having for its object to obtain a remedy against the bishop for having, without good cause, refused to admit and institute the clerk to the church to which he is presented; yet I am not aware of any case in which that remedy has been resorted to, except the remarkable case of Mr. Gorham in 1851–2. (1)

In that case it seems Mr. Gorham had brought a suit of quare impedit, and, on the 12th of June, 1850, had obtained a mandamus to the archbishop to examine and certify as to Mr. Gorham's alleged unsoundness of doctrine (2); but these proceedings appear to have been abandoned before the suit for duplex querela was instituted. In the case now before me Mr. Walsh, rector and vicar of Great Tey, in the diocese of Rochester, presented himself as patron to the parish church of Great Coates, in the diocese of Lincoln, the advowson of which he purchased from Sir John Sutton on the 21st of December, 1859, during the incumbency of the Rev. Henry Houson, who died on the 30th of May, 1873. On the 21st of July, Mr. Walsh wrote to the bishop's secretary, stating his desire to be instituted to the rectory of Great Coates. (I should observe here that I take these dates from the bill and

(1) See Moore's Special Report.
(2) Justice of the Peace, vol. xiv. p. 351.

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answer in Chancery and the proceedings in the Common Pleas referred to by both counsel in the arguments before me.) It appears that the bishop entertained doubts as to the legality of the presentation of Mr. Walsh himself, but expressed himself ready to admit a clergyman properly qualified for institution; and on the 20th of November he wrote to Mr. Walsh to the effect that he was legally advised that he might refuse to institute him, and as he was satisfied that he "morally ought to decline to do so," believing, as it appears, that the transaction was really, if not legally, simoniacal, he should refuse to admit him. On the 30th of November the benefice would lapse to the bishop; before that time arrived Mr. Walsh filed a bill in Chancery for an injunction against the bishop instituting any other clerk than himself to the rectory of Great Coates. In the bill Mr. Walsh stated, amongst other things, that "the plaintiff has been advised and insists that such institution would not be simoniacal. He desires, and is prepared, to try this question by proper proceedings. He is advised that difficulties exist in his bringing an action of quare impedit, by reason of such form of action being usually applicable to a case where the patron and clerk are distinct persons. He is further advised that a duplex querela in the Arches Court of Canterbury cannot be commenced until the expiration of twenty-eight days from the date when his petition for admission was first presented to the bishop. In truth, the plaintiff cannot at present take any proceedings to compel the bishop to institute him. He intends to commence proceedings in the form of duplex querela as soon as the twenty-eight days have expired."

The bishop in his answer stated, "I do refuse to institute the plaintiff to the said benefice. It is not the fact that the only objection which I have raised to the application by the plaintiff to be instituted thereto is the objection contained in my letter of the 17th of November. I have raised another objection in my letter of the 20th of November. My two objections are—1st. That the admission of the plaintiff to the said benefice upon the purchase made by him in the estate in the advowson of the said benefice as aforesaid would be simoniacal and void. 2ndly. That I am not bound to admit and institute to a benefice a clerk who, being himself patron, offers himself to the ordinary for admission;

and my reason for refusing to admit the plaintiff (if I have the power to refuse) is, that his acts above stated are morally, even if they are not in law, simoniacal." An interlocutory injunction, I understand, was granted. Mr. Walsh, however, did not proceed according to the averment in his bill, after the expiration of twenty-eight days, with the suit of duplex querela in this Court; but, on the 15th of January, 1874, brought an action of quare impedit in the Court of Common Pleas. He set out in his declaration, filed on the 29th of January, 1874, that he was seised of the advowson of Great Coates; and the death of the late incumbent, "whereby it then and there belonged, and still belongs, to the said plaintiff to present or otherwise legally require institution for a fit clerk to the said church being so vacant as aforesaid; but the defendant, the said bishop, will not permit him, but unjustly hinders him, wherefore the plaintiff says he is injured and hath sustained damage to the value of 10,000*l.*"

Mr. Walsh does not state in his declaration that he presented *himself* as clerk. To this declaration the bishop pleaded, amongst other things, that Mr. Walsh *had presented himself* to the next and only avoidance to the church which had happened since his purchasing the advowson, and that under the statute of 13 Anne, c. 11, "such presentation of himself by the plaintiff as aforesaid became and was utterly void, frustrate, and of no effect in law, and any admission or institution of the plaintiff thereon would have been utterly void, frustrate, and of no effect in law, and the defendant by reason thereof could not admit and institute the plaintiff to the said church by virtue of his presentation of himself as aforesaid, and refused to admit and institute the plaintiff thereto, and that the hindrance of the plaintiff's right in the declaration mentioned is the said refusal of the defendant and no other."

The plea was demurred to, and there was a formal joinder in demurrer on the 2nd of March.

The case stood for argument on the 4th of May, but owing to the pressure of business in the Court of Common Pleas, has stood over from that time.

I now come to the proceeding in the Arches Court. I find that the monition was extracted on the 12th of February; was served

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on the bishop on the 7th of April, after, therefore, the joinder in demurrer in the action in the Common Pleas on the 2nd of March; and now the bishop makes application to this Court that Mr. Walsh may be ordered to elect in which court he intends to proceed.

It seems a simple rule of natural justice and equity that a man should not be harassed by two suits or actions, the objects of which are substantially the same. I am not aware of any direct decision upon the point in the Court of Arches, but the industry of counsel has brought to my attention various authorities upon the point in other courts, to some of which I will now refer.

And first as to the common law. In Bacon's Abridgment I find it stated that "the law abhors multiplicity of actions; and therefore whenever it appears on record, that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate; for if it were allowed that a man should be twice arrested or twice attached by his goods for the same thing, by the same reason he might suffer in infinitum; and it is not necessary that both should be pending at the time of the defendants pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill ab initio." (1)

Another passage from the same writer, very much to the point, as it seems to me, is as follows:—"In a quare impedit brought by the Earl of Bedford against the Bishop of Exeter and others, the defendants plead that the plaintiff had brought another quare impedit for the same presentation, which is still depending and undetermined, with an averment that it was the same plaint, avoidance, and disturbance; the earl replies, that since his former writ purchased, the same church being still void, he presented Henry Curtis to the bishop, who refused him, which is the disturbance he now complains of, and traverses that it is the same disturbance on which both actions were brought: the defendant demurs; and ruled, the writ should abate; for though there must be a disturbance naturally to maintain the action, yet the prin-

(1) Bac. Abr. tit. Abatement, M.

cipal effect of the suit is to recover the presentation, and the nature of a quare impedit is to be final on nonsuit or discontinuance, which this would defeat; for by this rule the plaintiff might bring a new one without leaving the former suit. And though in this case there was a new defendant, yet the writ abated, because there were two quare impedits against the same man; and therefore a fresh defendant could no more enable him to bring a second quare impedit than a new disturbance could." (1) With respect to courts of equity, I find it laid down in Eden on Injunctions, p. 34, that "where a plaintiff is proceeding both at law and in equity, the defendant may by a motion of course compel him to elect in which court he will sue, and if he elects to proceed in equity, the proceedings at law are, by that order, stayed by injunction." To the same effect is the more recent work of Mr. Daniell, Chancery Practice, vol. i., p. 718. I have looked into the cases cited by Eden and Daniell to support this proposition, and find them adequate. The case of a mortgagee is an exception to this rule; it is frequently said that he may pursue all his remedies concurrently at any rate; he can proceed on his mortgage in equity, and on his bond or covenant at law at the same time. Nevertheless, in *Barker* v. *Smark* (2), Lord Langdale said that in the case where the vendor had taken a bond to secure the purchase-money, he could not be permitted to sue at law and in equity at the same time; and he was not injured, for if he failed in one remedy he might resort to the other.

The same doctrine was maintained in the Admiralty Court by Dr. Lushington in the case of *The Lanarkshire* (3), and in the court—so long of twin jurisdiction with the Court of Arches—formerly the Prerogative Court of Canterbury, in a case in which a creditor had cited an executor to bring in an inventory, and afterwards filed a bill for discovery in Chancery, the executor appeared under protest, and alleged that the creditor had made his option by filing a bill for a discovery in Chancery, and that he ought not to be harassed in both courts for the same matter, and prayed to be dismissed with costs. And that very

(1) Bac. Abr. tit. Abatement, M. (2) 3 Beav. 64.
(3) 2 Eccl. & Adm. (Spinks) 189.

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eminent judge, Sir George Lee, sustained the protest: *Pearson* v. *Gamon.* (1)

Looking to these authorities, and to the reason of the thing, I am of opinion that I ought to put the plaintiff to his election if he be really raising the same question in the Common Pleas and in the Court of Arches. It was very ingeniously argued by Mr. Shaw that a question as to the bishop's discretion might be raised here which could not be raised in the Common Pleas, and that Mr. Walsh was proceeding as patron in the Common Pleas and as presentee here, so that different rights were tried in the different courts; but I cannot accede to this argument. The right of the patron is not in dispute in either suit; in both the same question is really in substance raised, namely, whether Mr. Walsh be or be not entitled as presentee to be instituted to the rectory of Great Coates. I must order Mr. Walsh to make, within ten days from this time, his election in which court he will proceed, and if he does not make his election in that time, I shall dismiss the suit in this court. He must make his election by filing a notice in the registry. I shall make no order as to costs in this motion. If Mr. Walsh elects to proceed in the Court of Common Pleas, I shall order him to pay the costs of the proceedings in this suit.

June 4, 1874. No notice having been filed in the registry, the suit was dismissed on the motion of the proctor for the Bishop of Lincoln.

Proctor for plaintiff: *Brooks.*
Proctor for defendant: *Crosse.*

(1) 2 Lee, 268.

[IN THE ARCHES COURT OF CANTERBURY.]

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June 17.

THE OFFICE OF THE JUDGE PROMOTED BY RICHARDS *v.* FINCHER.

Officiating without Leave—Unconsecrated Chapel—Licence by Bishop with consent of deceased Incumbent—1 & 2 *Vict. c.* 106, *s.* 95.

The bishop of a diocese granted a licence to a clerk in holy orders to officiate as minister in an unconsecrated proprietary chapel in a parish within the diocese; the licence was granted with the consent of the incumbent of the parish. Afterwards the bishop died, and the incumbent of the parish died, and the succeeding incumbent forbade the clerk to minister in the parish. The clerk insisted on his right to officiate in the said chapel, and the succeeding incumbent promoted criminal proceedings against the clerk under the Church Discipline Act, and prayed that he should be monished to abstain from officiating in the chapel:—

Held, that the licence was invalid as against the promoter, and did not, under the circumstances, authorize the defendant to officiate in the chapel:

Held, that the clerk could not be considered as a curate, and was not entitled to the benefit of the provisions of the 95th section of 1 & 2 Vict. c. 106.

IN this case the Rev. Joseph Guillemard Fincher, of Sea View, in the parish of St. Helen's, in the Isle of Wight, and diocese of Winchester, a clerk in holy orders of the Church of England, was charged on the complaint of the Rev. William Henry Richards, the vicar of the said parish of St. Helen's, with having, within the diocese of Winchester, offended against the laws ecclesiastical, by having, without the leave and contrary to the express injunctions of the said Rev. William Henry Richards, officiated as a clergyman of the Church of England in a chapel in connection with the Church of England, called Sea View Chapel, situate in the said parish of Saint Helen's, and performed therein the offices of the Church to divers parishioners of the said parish, and collected therein offertory alms and administered the same, and pastorally visited divers parishioners of the said Rev. William Henry Richards, residing in the said parish; and the Bishop of Winchester, on application being made to him in the first instance, and without issuing any preliminary commission, signed letters of request, under the 13th section of the Church Discipline Act (3 & 4 Vict. c. 86), for the purpose of enabling proceedings to be taken in this Court.

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The following note or minute was indorsed by the Bishop of Winchester on the letters of request:—

These letters of request are given by me on the application of the Rev. William Henry Richards, in order that a judicial decision may be obtained as to the right of the Rev. J. G. Fincher to officiate within the unconsecrated proprietary chapel of St. Peter, Sea View, under the licence granted by my predecessor. It has appeared to me that that licence having been granted with the consent of the late incumbent, and upon the nomination of the proprietors of the chapel, and so in accordance with ecclesiastical law, it would remain in force until notice by me, and therefore that Mr. Fincher, in officiating within the walls of the chapel, was not violating the law. I am assured by Mr. Fincher that he neither collects the offertory in the chapel nor pastorally visits any of the parishioners of St. Helen's. If the licence granted by my predecessor is still in force, I see no sufficient reason for revoking it.

E. H. Winton.

On the 24th of April, the Dean of Arches, on the motion of Dr. Tristram, accepted the letters of request so indorsed, and directed a decree by letters of request to issue citing the Rev. J. G. Fincher to appear and answer to articles to be administered to him in a cause of office at the voluntary promotion of the said Rev. W. H. Richards. (1)

An appearance in the cause was entered on behalf of the Rev. J. G. Fincher, and on behalf of the promoter, articles, the admission of which were not opposed, were filed, containing substantially the following allegations:—

1. That on the 9th day of December, 1872, the Rev. William Henry Richards, a clerk in holy orders, and the promoter of this cause, was instituted into the vicarage of St. Helen's, in the Isle of Wight, in the diocese of Winchester, in the province of Canterbury, and on the 16th day of the same month was inducted into the said parish and has ever since remained and still is the vicar of the said parish, and as such vicar is entitled to the sole cure of souls in the said parish.

2. That by a certain indenture, dated the 9th day of June, a piece of land, situate in the hamlet of Sea View, in the said parish of St. Helen's, was demised to trustees for a term of nine hundred and ninety-nine years, to hold the same, subject to the payment of an annual rent, for and on condition that the said trustees should, within two years from the date of the said indenture, erect a building thereon, to be used, under licence, as a chapel of ease, in connection with the Church of England, during the said term. That in the year 1859, a building for the purpose aforesaid was erected on the said site, and that the said building

(1) For former proceedings against Mr. Fincher see *Richards* v. *Fincher*, ante, p. 107.

was afterwards licensed for the performance of divine worship therein according to the rites of the Church of England, and that the services of the said Church of England were performed in the said licensed building from the year 1859 up to the year 1868 by the then vicar of St. Helen's or his curate. That in the year 1870, the then bishop of the said diocese of Winchester, on the nomination of the said trustees of the said licensed building, and with the consent of the Reverend William Henry Dearsley, the then incumbent of the said parish, granted his licence to the Reverend Joseph Guillemard Fincher, a clerk in holy orders of the Church of England, being the party proceeded against in this cause, to perform the office of minister in the said licensed building, and to conduct the pastoral visitation and cure of souls in a conventional district agreed to by the said then vicar of the said parish, and that he was also authorized to receive and administer the offertory collections made in the said chapel. That the said Joseph Guillemard Fincher continued to perform the office of minister in the said licensed building and conventional district from the date of the said licence up to the time of the death of the said Reverend William Henry Dearsley, which took place on the 30th day of June, 1872.

3. That on the 13th day of January, 1873, the said Reverend William Henry Richards, the successor of the said Reverend William Henry Dearsley, as vicar of the said parish, by letter gave notice to the said Reverend Joseph Guillemard Fincher that his said licence to act as minister in the said licensed building and conventional district had ceased by reason of the change of vicars. And the said Reverend Joseph Guillemard Fincher, notwithstanding the said notice, having continued to officiate in the said licensed building and conventional district, about noon of Monday, the 10th day of March, 1873, the said Reverend William Henry Richards served on the said Reverend Joseph Guillemard Fincher a notice in writing prohibiting him from officiating as minister of the Church of England within the said parish of St. Helen's, including the said licensed building and conventional district, and that the exhibit A is a true copy of such notice.

4. That notwithstanding and subsequent to the service of the said notice of the said 10th day of March, 1873, in the last preceding article mentioned, the said Reverend J. G. Fincher, without the leave and contrary to the said express injunctions of the said Reverend W. H. Richards, officiated in the said licensed building by performing divine service therein according to the rites of the Church of England, namely, on the afternoon of the said 10th day of March, 1873, and on the morning of the 11th day of March, and that on every subsequent Sunday between the said 11th day of March, 1873, and the 13th day of April, 1874, the said Reverend Joseph Guillemard Fincher hath in the said licensed building performed divine service according to the rites and ceremonies of the Church of England, and hath also administered the holy sacrament therein.

5. That notwithstanding the said notice of the said 10th day of March, 1873, the said Reverend Joseph Guillemard Fincher hath on every Sunday between the said 10th day of March, 1873, and the said 13th day of April, 1874, collected or caused or allowed to be collected in the said licensed building the offertory money, and hath himself disposed of the same without the consent of the said William Henry Richards as vicar of the said parish.

The 6th article contained an averment that the Reverend

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Joseph Guillemard Fincher was subject to the jurisdiction of the Court. The articles concluded with a prayer, that on due proof of the premises so far as in law shall be necessary, the Court would be pleased to pronounce that the said Reverend J. G. Fincher had offended against the laws ecclesiastical of this realm in the matters hereinbefore alleged, some one or more of them, and that he be canonically corrected and punished according to the exigency of the law, and be monished to abstain thereafter from officiating as minister in the said licensed building called Sea View Chapel, or in any part of the ecclesiastical parish of St. Helen's, in the Isle of Wight aforesaid, without the consent of the said vicar of the said parish, and be condemned in the costs hereby incurred on the part or on behalf of the promoter of this suit, and compelled to the due payment thereof.

The following exhibit, marked A, was annexed to the articles:—

Vectis House, Sea View,
Monday, 10th March, 1873.

To the Rev. J. G. Fincher.

Sir,—I hereby, as incumbent of Saint Helen's, formally forbid you, or any one else in your stead, from the date of this notice, to minister as a clergyman of the Church of England within the parish of Saint Helen's (excluding, of course, St. John's ecclesiastical district), which you know includes Sea View, and Salterns, and Nettlestone, without my sanction.

W. H. Richards,
Incumbent of St. Helen's, Isle of Wight.

The proctor for the defendant brought in a responsive plea, in which he admitted the truth of the allegations contained in the 1st, 4th, 5th, and 6th paragraphs of the articles, and alleged in substance as follows:—

2. The licence granted to the defendant, and referred to in the second article of the said articles, was in the words and figures following:—

"Samuel, by Divine permission Lord Bishop of Winchester: to our beloved in Christ, Joseph Guillemard Fincher, Clerk in holy orders. Greeting.

"Whereas you, the said Joseph Guillemard Fincher, having been appointed by us to perform the office of minister of the church or chapel of St. Peter, at Sea View, in the parish of Saint Helen's, in the Isle of Wight, in the county of Southampton, and within our diocese and jurisdiction, with the assent of the owners or proprietors of the said church or chapel, and with the consent in writing of the Reverend William Henry Dearsley, Vicar of the said parish: We do by these presents give and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide, our licence and authority to perform the office of minister in the said church or chapel in reading the Common Prayers and performing other ecclesiastical duties belonging to the said office according to

the form prescribed in the Book of Common Prayer made and published by authority of Parliament and the canons and constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner: And we also grant unto you our licence and authority to conduct all the pastoral visitation and cure of souls in the following conventional district, as agreed to by the Vicar of the said parish (that is to say), Sea View, the cottages at Salterns, and as far as Fairy Hill on the Nettlestone Road (you having first in the presence of our commissary, duly appointed, made and subscribed the declaration of assent and taken the oath of canonical obedience to the Bishop, as required by law to be made, subscribed, and taken). And we authorize you to receive and administer the offertory collections in the said church or chapel. In witness whereof we have caused our episcopal seal to be hereunto affixed, dated the 7th day of April, in the year of our Lord, 1870, and in the first year of our translation."

In the margin a seal and "S. Winton," and the following note:—

"The Bishop will revoke the licence, and will not countersign the testimonials of any curate who accepts a smaller stipend than the sum assigned in the licence, or who undertakes the duty of another cure without the Bishop's sanction, or who resigns the curacy to which he is licensed without giving the Bishop notice of his intention. In ordinary cases three months notice will be required."

Indorsed: "St. Peters, at Sea View, Isle of Wight, Winchester. The Rev. J. G. Fincher's Licence, 7 April, 1870."

Save as aforesaid, the allegations contained in the said second Article are true.

3. The letter of the 13th day of January, 1873, mentioned in the said Articles, was in the words and figures following:—

"Sea View, Ryde, I. W.
"Monday, 13th Jan., 1873.

"Dear Sir,—Believing you may be going from home for some few days, I think it better to tell you at once what I heard on Saturday morning last, viz. this: that it is the Bishop of Winton's opinion, and his secretary's opinion also, that your licence as minister to the licensed building called St. Peter's, and to the conventional district named in your licence, ceased with the change of incumbents of St. Helen's. This being so, I am sorry to have to tell you that I will not consent to its renewal. If you wish to remain, I'm sorry that it should be so, but you will allow that it is only natural that I should wish to have my parish under my own care. I hope you will find some other place soon congenial to you.

"Will you oblige me, please, at your earliest convenience, with a list of the sick that you are now visiting, and I should feel thankful for any other information you will kindly give respecting this conventional district.

"I am, dear Sir, yours very truly,

"The Rev. J. G. Fincher, Sea View." "W. H. Richards.

Save as aforesaid, the allegations contained in the said third Article are true.

5. No claim to the disposition of the said offertory money mentioned in the said articles has ever been made by the promoter, nor has the promoter ever forbidden the defendant to collect or dispose of the said offertory money.

7. The defendant, since his appointment and licence to the said chapel, in the belief that he was permanent minister thereof, has built a chancel to the

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said chapel, and has for this and other improvements and adornments of the said chapel, collected and expended about 600*l.* He has since his said appointment and licence continually provided a large number of services and celebrations of the Holy Communion, amounting to twenty services a week, for the people residing within the conventional district mentioned in his said licence, and he has had large congregations, often amounting to two hundred persons. He has not, since the said 10th day of May, 1873, celebrated or administered the Holy Communion in the parish of St. Helen's, except within the walls of the said chapel, and he submits that his acts above stated, or admitted, do not amount to any ecclesiastical offence.

June 13. The case came on for hearing.

Dr. Spinks, Q.C., and *Dr. Tristram*, for the promoter. The incumbent of a parish is the person responsible for the cure of souls in the parish, and no person can be allowed to officiate in his parish without his leave.

Dr. Deane, Q.C., and *W. G. F. Phillimore*, for the defendant. In this case the defendant was duly licensed by the bishop, with the consent of the incumbent of the parish for the time being, and this licence can only be revoked by the bishop or by the successor of the bishop. The licence being well granted with the consent of the incumbent, the death of the incumbent cannot render the licence void. At all events, the defendant is entitled to notice according to the provisions of the 95th section of 1 & 2 Vict. c. 106. [They cited Phillim. Ecc. Law, 1182; *Bliss* v. *Woods* (1); *Williams* v. *Brown* (2); *Hodgson* v. *Dillon* (3); *Moysey* v. *Hillcoat* (4); *Liddell* v. *Rainsford.* (5)]

Dr. Spinks, Q.C., in reply.

Cur. adv. vult.

June 17. SIR ROBERT PHILLIMORE. This is a suit brought by letters of request from the Bishop of Winchester to this Court. In it the Rev. W. H. Richards, incumbent of St. Helen's, Isle of Wight, promotes the office of the judge against the Rev. J. G. Fincher, of Sea View, in the Isle of Wight. The offence charged is, that Mr. Fincher, without the leave and contrary to the express injunction of Mr. Richards, has performed divine service, and

(1) 3 Hagg. Eccl. 486.
(2) 1 Curt. 53.
(3) 2 Curt. 388.
(4) 2 Hagg. Eccl. 30, 48.
(5) 37 L. J. (Eccl.) 83.

has also collected offertory money and disposed of the same in an unconsecrated building in the parish of the vicar, and the vicar prays that he may be monished to abstain from so doing, and that he may be condemned in the costs.

The defence set up in a responsive plea is, in substance, that the late Bishop of Winchester, with the consent of the late vicar, authorized Mr. Fincher to officiate in this building, and that such licence has never been revoked: and with respect to the offertory money, that he was never forbidden by the vicar to collect or dispose of it, and that no demand has been made upon him by the vicar for it; the truth of this averment having been admitted by the promoter, it will not be necessary that I should refer to this second part of the case again.

In order to ascertain the validity of the defence upon the first part of the case, I must advert to some of the admitted facts.

The licence given by the late Bishop of Winchester is as follows:—[The learned judge here read the licence set out above.]

To this licence was appended a note as has been admitted, by error, from a printed copy of a note usually part of an ordinary curate's licence. I mention this because the language of it can have no effect upon this case.

It will be seen from this licence that the chapel is a proprietary chapel; that the consent of the then vicar preceded the grant of the licence, which extended not only to the officiating within the walls of the building, but also to what is called "the pastoral visitation and cure of souls," in a particular "conventional district." I mention this circumstance, because I think it has been rightly observed that if this licence be still in force it must be valid in this respect as well as in others.

The late vicar died on the 30th of June, 1872; his successor was instituted to the vicarage on the 9th of December, 1872; and on the 13th of January, 1873, he wrote the following letter:—[The learned judge here read the letter of the 13th of January, 1873, set out above.] And on the 10th of March, the following letter:—[The learned judge here read the letter of that date, set out above.]

The defendant says in one of the articles of his plea, that "since

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his appointment and licence to the said chapel, in the belief that he was permanent minister thereof, he has built a chancel to the said chapel, and has for this and other improvements and adornments of the said chapel collected and expended about 600*l.* He has since his said appointment and licence, continually provided a large number of services and celebrations of the Holy Communion, amounting to twenty services a week for the people residing within the conventional district mentioned in his said licence, and he has had large congregations often amounting to two hundred persons. He has not since the 10th day of March, 1873, celebrated or administered the Holy Communion in the parish of St. Helen's, except within the walls of the said chapel; and he submits that his acts above stated or admitted do not amount to any ecclesiastical offence."

The law is perfectly clear upon three points applicable to this case: First, that the bishop has no authority whatever over any unconsecrated proprietary chapel. Secondly, that no clerk in holy orders can legally minister therein without the licence of the bishop, which is not, as is sometimes carelessly said, a licensing of the place, but a licensing of the clerk to perform divine service in that place. Thirdly, that it is not competent to the bishop to grant such a licence without the previous consent of the incumbent.

The law being so clear upon those points, I called upon the counsel for the defendant to state what circumstances there were to remove this case from the application of the law, and in answer to my question it was admitted that, according to the general law, a clerk could not officiate, as in this case, without the consent of the incumbent, but it was stated quite correctly, I believe, that this was the first instance in which the right of an incumbent to revoke a consent granted by his predecessor had been submitted to a legal tribunal, and it was contended that the incumbent had no such right, and that he ought to have applied to the bishop to revoke the licence if he wished to prevent the defendant from officiating in the proprietary chapel. In considering whether an incumbent can revoke the consent of his predecessor, which is the point now to be judicially determined for the first time, it is not unimportant to observe what the law is with respect to the power of the bishop to revoke his licence; that point has been deter-

mined by a judgment of Dr. Lushington in the case of *Hodgson* v. *Dillon* (1), from which I will cite the following extract:—

I think that the principle on which the law of the Church of England stands in this matter, is this:—no clergyman whatever of the Church of England has any right to officiate in any diocese in any way whatever, as a clergyman of the Church of England, unless he has a lawful authority so to do, and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways; as, by institution (in the case of a benefice), by licence, when the party is a perpetual curate, and by licence when the clergyman officiates as stipendiary curate.

I do not think it requisite to consider what is done in the case of rectors, vicars, and perpetual curates, because these persons are now all regulated by the law of the land. The point I have to consider is this: What is the nature of a proprietary chapel unconsecrated, and what is the nature of a licence granted by the bishop to the minister of such a chapel, by what power and authority he grants such licence, and whether, on the ground of having granted such licence, he is estopped from remedy himself, except in the mode required by law.

I need not state that the ancient canon law of this country knew nothing of proprietary chapels at all. The necessity of the times and want of accommodation in the churches and chapels in the metropolis and other large towns gave rise to the erection of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The licence granted by the bishop on such occasions emanates from his episcopal authority. He could not however grant such a licence without the consent of the rector or vicar of the parish, for the cure of souls belongs exclusively to the rector or vicar. Here is the consent of the rector obtained, not to an ordinary licence to a stipendiary curate, but to confer a nondescript title, that of minister of an unconsecrated chapel.

The bishop, therefore, confers this licence by virtue of his episcopal authority. What is to prevent his revocation of it at any time he may think fit? Is this a licence which will not only be good against him, but is it to prevail against any successor who may come after him? It is a licence granted only from the exigency of the moment and for no other reason whatever.

It is clear, then, as a matter of law, that the bishop cannot grant his licence without the previous consent of the incumbent, and that he may revoke it even when granted by his predecessor; it is clear, as a matter of fact in this case, that the present incumbent has never given his consent, but expressly refused it, and that if this licence be still valid, the defendant may officiate without his permission within this parish. It is said that the bishop may, upon application, withdraw his licence; but supposing that he should (as in this case, from the note upon the letters of request to me, it is probable he would) refuse to do so, what remedy

(1) 2 Curt. 388.

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would the incumbent have except an appeal to this court? The more I have considered the question, the more it has appeared to me that it cannot be according to the law, that an incumbent should be deprived of his right of consent in this matter indirectly, when it is admitted that he could not be deprived of it directly; if it were otherwise the incumbent to whom the whole cure of souls has been committed would have to share with another person in whom he had no confidence, but for whom he would be responsible.

I am of opinion that, as against the promoter, this licence is invalid, and that the defendant is not authorized by it to officiate in the building or in the conventional district.

There remains to be noticed another argument much pressed upon me by both of the counsel for the defendant, namely, that the defendant must be considered as a curate, and therefore the incumbent must exercise his right according to the 95th section of 1 & 2 Vict. c. 106.

This contention was mainly founded upon the expressions of Sir John Nicoll in *Moysey* v. *Hillcoat* (1), which was also a case of officiating in a proprietary chapel, and in which Sir John Nicoll said Dr. Hillcoat was the curate of Dr. Moysey so far as respected the officiating in this chapel, but no further or otherwise; but it is quite plain from the context that Sir John Nicoll by the use of the word curate did not mean to place Dr. Moysey in the strictly legal category of a curate; he only uses the word to illustrate the general nature of the relation which subsisted between Dr. Moysey and Dr. Hillcoat.

I may also observe that 1 & 2 Vict. c. 106 was passed A.D. 1836, and the judgment in *Hodgson* v. *Dillon* (2) was given in 1840, in which the minister of the proprietary chapel was distinctly not put upon the same footing as a curate. I am of opinion that this defence also fails. It is hardly necessary to observe that this decision proceeds upon a question of strict law, and that I am not at liberty to consider whether the demand of the promoter to have his right enforced be or be not expedient for the interests of the parish.

If the promoter requires it he is entitled to his costs, but I

(1) 2 Hagg. Eccl. 30, 48. (2) 2 Curt. 388, 393.

think it probable that having regard to the circumstances of the case he will not ask for them. 1874

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I must order the monition against the defendant to issue as prayed.

Proctors for promoter: *Moore & Currey.*

Proctor for defendant: *Brooks.*

[IN THE ARCHES COURT OF CANTERBURY.] *Nov.* 7.

APPEAL FROM THE CONSISTORY COURT OF LICHFIELD.

GARDNER AND ANOTHER, APPELLANTS; ELLIS, RESPONDENT.

Pleading—Application for Faculty for Removal of certain Additions and Articles placed in Parish Church without lawful Authority—Confirmatory Faculty—Practice as to Retention of Causes of Faculty.

The vicar and one of the churchwardens, and the parishioners and inhabitants of a parish, were cited in the Consistory Court of Lichfield to shew cause why a faculty should not be granted for the removal of certain additions and articles alleged to have been placed in the church without a faculty. An appearance was entered on behalf of the vicar and the said churchwarden. They brought in an act on petition which concluded with a prayer to the judge to direct the issue of a faculty confirming the placing of the said additions and articles in the church. The judge directed this prayer to be struck out of the act on petition:—

Held, on appeal to the Arches Court of Canterbury, that the prayer ought not to have been struck out, and that the defendants below were entitled to pray for a confirmatory faculty without the issue of a fresh citation.

THIS was an appeal from an interlocutory judgment of the judge of the Consistory Court of Lichfield, the Right Rev. and Worshipful Bishop Hobhouse, in a cause promoted by John Ellis, a parishioner, and one of the churchwardens of the parish of St. Matthew, Smethwick, in the county of Stafford and diocese of Lichfield, citing "The Rev. Herbert Gardner, clerk, vicar of the said parish, as well as George Richard Perrins, one of the churchwardens of the said parish, as also the parishioners and inhabitants of the said parish, and all other persons whosoever having any right, title, or interest in the said parish or parish church," to shew cause why a licence or faculty should not be granted authorizing the removal of a certain reredos, super-altar, metal cross, and

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certain vases erected and introduced into the chancel of the said parish without lawful authority, and contrary to law.

It appeared by the process from the Consistory Court of Lichfield, as lodged in the registry of the Court of Arches, that the usual citation or decree with intimation having issued in the cause had been personally served on the Rev. Herbert Gardner and George Richard Perrins on the 12th of March, 1874, and that a copy had been affixed and left affixed on the outer door of the parish church of St. Matthew, Smethwick, on the Sunday morning next after the date thereof.

It also appeared that on the citation being so served an appearance had been duly entered on behalf of the vicar and the said churchwarden, and that subsequently their proctor had brought in an act of petition in opposition to a faculty, as prayed by the promoters, being granted. This act on petition, although it stated in detail a number of circumstances connected with the additions and articles complained of, and denied many of the allegations made on behalf of the promoter, did not allege that the articles had been placed in the church under sanction of a faculty, and concluded with a prayer which, as entered on the minutes, was substantially as follows :—

> Wherefore the said proctor for the defendants prayed the judge to refuse the prayer of the plaintiffs in these proceedings that a faculty should be granted authorizing the removal of the reredos, super-altar, metal cross, and vases as at present erected in the chancel of the said parish church of St. Matthew, and he further prayed him to direct the issue of a faculty confirming the erection of the said reredos, super-altar, metal cross, and vases as aforesaid.

The admission of so much of the above prayer as prayed for a faculty in confirmation of the several articles and additions alleged to be illegally introduced and erected was opposed by the proctor for the promoter in the Court of Lichfield, on the ground that no such faculty could be granted until a fresh citation had been issued citing the parishioners and others interested in the premises to appear and shew cause in opposition thereto.

On the 3rd of June the right reverend judge, by his interlocutory judgment, ordered the act on petition to be amended by the omission of the prayer for a faculty to confirm the erection and introduction of the ornaments therein mentioned. Against this grievance the appeal was brought, and now came on to be heard.

Dr. Middleton and *W. G. F. Phillimore* appeared for the appellants, and prayed the Dean of Arches to pronounce for the appeal, to reverse the decree appealed from, and to condemn the respondent in costs, and further to retain the principal cause.

[They cited *Sieveking* v. *Kingsford.* (1)]

Dr. Tristram, for the respondent, supported the decree appealed from.

SIR ROBERT PHILLIMORE. In this case the Court is not called upon to pronounce any opinion whatever upon the merits of the suit instituted in the Consistorial Court of Lichfield. The question before me to-day is simply a question of the practice of the Ecclesiastical Court, namely, whether when due notice has been given to a parish by the formal instrument called a citation that certain alterations made in the parish church without a faculty are objected to, and the parties to the suit appear, it is competent to them, after an admission that the alterations have been made without the authority of a faculty, to pray that a confirmatory faculty may be issued for the purpose of legalising such alterations, or whether it is necessary that there should be a fresh suit commenced and a fresh citation issued before the Court can consider whether such a confirmatory faculty ought to be granted. Now I am of opinion that according to the proper practice of the Ecclesiastical Court such a fresh suit or fresh citation is not necessary, and I should be very sorry to find any contrary opinion laid down by any binding authority. I am of opinion that the prayer for a confirmatory faculty ought not to have been struck out of the pleadings in this suit, but ought to have been admitted. I am clearly of opinion that the parties proceeding were entitled to the costs which had been incurred in the suit up to the moment when the confirmatory faculty was prayed.

The case of *Sieveking* v. *Kingsford* (1) has been referred to: that was a case in which I was counsel and Dr. Tristram was opposed to me, and it is in point as establishing that, according to the practice of the Ecclesiastical Courts, it is not necessary to issue a fresh citation in a case where the Court is once possessed of the whole question as to the legality or illegality of certain

(1) 36 L. J. (Eccl.) 1.

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alterations in a parish church. I must reverse the sentence of the judge of the court below so far as it extends to his striking out the prayer for a confirmatory faculty.

Dr. Middleton. The appellants are anxious that the cause should be tried at once in this Court. It is obvious that the proceedings in the Lichfield Court are conducted in a very irregular way, and it will be to the advantage of all parties to have the matters in dispute at once determined by a competent tribunal.

Dr. Tristram. The local tribunal is the proper tribunal to decide this suit. The question whether a confirmatory faculty should be granted as prayed is one most proper to be determined by the judge of the Consistory Court.

SIR ROBERT PHILLIMORE. All these questions of faculties for alterations in churches are in the first instance eminently fit to be dealt with by the local Ecclesiastical Court. There is so much discretion invested in the judge of first instance in respect to the propriety of issuing faculties, that it is desirable, in my judgment, that the question of faculty or no faculty should in the first instance be raised in the diocesan court. In cases where a grave point of law is raised I should be willing to take the case in this court in the first instance; but where the question to be decided is merely one in the discretion of the diocesan judge, I should be loath to retain the cause unless in accordance with the wishes of both parties.

I shall remit the cause to the court below with directions that that portion of the act on petition which prays for a confirmatory faculty should be admitted. The appeal is therefore allowed; it will be for the local court to decide as to the merits of the cause. The appellants are, I think, entitled to the costs of this appeal.

Proctor for appellants: *Nelson.*
Proctor for respondent: *Brooks.*

THE KATHLEEN. (6733. 6740. 6769.)

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Salvage—Pleading—Right of Shipowner to Freight after Abandonment of Ship.

A barque laden with a cargo shipped at Charleston under bills of lading whereby the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen, was run into in the English Channel and damaged by another vessel, which was alone to blame for the collision. The master and crew of the barque abandoned her, and in her abandoned state she was taken possession of by salvors, who brought the barque and her cargo into Dover. The cargo was damaged by sea-water, and was alleged to be deteriorating. In a suit instituted by some of the salvors against the barque, her cargo, and freight, the Court, on an application made on behalf of the plaintiffs, without notice to the owners of the barque, ordered the cargo to be sold. The owners of the barque afterwards hearing of the order, and wishing to have the cargo transhipped and carried on to its destination, applied to the Court to rescind the order, and offered to give bail for the cargo. The Court being of opinion that it was for the benefit of all parties that the cargo should be sold, refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold, and the proceeds brought into Court, and the owners of the barque then applied to the Court to order the payment out of the proceeds in Court of a sum of money in respect of freight:—

Held, that, by the abandonment of the barque, the contract to pay freight had been dissolved, and that the owners of the barque were not entitled to any payment in respect of freight.

THE *Kathleen* was a barque of 462 tons, and in December, 1873, was laden at the port of Charleston, in the United States of America, with a cargo consisting of 1620 bales of cotton, under several bills of lading, whereby the same was to be delivered at the port of Bremen (the dangers of the seas excepted) unto the order of the several shippers or assigns, he or they paying freight for the said cotton at certain rates per pound of invoice weight (amounting for the whole of the said cotton to the sum of 2081*l.* 16*s.* 1*d.*), and primage and average (amounting to the sum of 104*l.* 1*s.* 10*d.*). The *Kathleen* sailed from Charleston with the said cargo on board and was proceeding on her voyage to Bremen on the 24th of January, 1874, when she was run into in the English Channel, off Hastings, by the *Mallowdale*, an iron ship of about 1200 tons which struck her on the port bow, cut her down, and otherwise did great damage to her. For this collision the *Mallowdale* was solely to blame. On the morning of the following day the master

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and crew of the *Kathleen* were compelled to leave her, as she had become unmanageable, and were taken on board the *Mallowdale* (which had remained by the *Kathleen* during the night), and landed at Deal. After the master and crew of the *Kathleen* had so left her, a French lugger, the *St. Claire*, of Boulogne, came up to the *Kathleen*, and some of the crew of the *St. Claire* went on board of the *Kathleen*, and remained there until after a number of fishing boats from Hastings had come up, and the men from the said Hastings boats had taken charge and possession of the *Kathleen*.

Eventually the said Hastings men, with the assistance of a lugger from Deal, and of the steam-tug *Palmerston* from Dover, succeeded in bringing the *Kathleen* and her cargo to Dover, where she arrived on the 27th of January.

On the 27th of January, 1874, a salvage suit (No. 6725) was instituted on behalf of the owners, master, and crew of the steam-tug *Palmerston* against the barque *Kathleen*, her cargo, and the freight due in respect thereof, and on the same day the *Kathleen* and her cargo were arrested at Dover by a warrant issued in the suit. The owners of the *Kathleen* having duly appeared, a commission of unlivery issued on the 30th of January, under which the cargo was unladen. On the 2nd of February a salvage suit (No. 6733) was instituted on behalf of the owners, masters, and crews of the seven fishing luggers belonging to Hastings against the *Kathleen*, her cargo, and the freight due in respect thereof. After the institution of this last-mentioned suit the plaintiffs in suit No. 6725 abandoned that suit (1), and instituted on the 5th of February a fresh salvage suit (No. 6740) against the *Kathleen*, her cargo, and freight. The owners of the *Kathleen* and the owners of her cargo appeared separately in each of the suits No. 6733 and No. 6740. On the 9th of February the plaintiffs in cause 6733, at the instance of the owners of the cargo, but without notice to the owners of the *Kathleen*, and without their knowledge, applied for and obtained an order of the Court to have the cargo appraised and sold. This order was made on an affidavit, which stated that the cargo was deteriorating in value. The owners of the cargo for-

(1) It is believed that this suit was abandoned owing to some informality in the proceedings.

mally consented to the order. On the 12th of February the fact that this order had been made first came to the knowledge of the owners of the *Kathleen*, and their solicitors at once filed a notice of motion that they should move the Court to set aside the order for the sale of the cargo, and to order that the owners of the *Kathleen* should be allowed, on giving bail in the salvage suits for the cargo, to carry the same on to its destination in order to earn freight, or to order that if the said order for sale were allowed to stand, the owners of the *Kathleen* should be paid the amount of their freight out of the proceeds of the sale.

Feb. 18, 1874. *Aspland*, on behalf of the owners of the *Kathleen*, moved the Court in pursuance of the notice of motion. He offered to give bail for the cargo, and insisted on the right of the owners of the *Kathleen* to carry on the cargo so as to earn freight, or to be paid freight if the owners of the cargo preferred to demand delivery at Dover. In support of the motion affidavits were filed, in which it was stated that the owners of the *Kathleen* desired the cargo to be forwarded to Bremen, and that they were willing to give bail to satisfy the claims of the salvors in respect of the cargo; that the cargo was in a state as fit to be carried to Bremen as to London; that it would sell at Bremen to more advantage than in London, and that the cost of bringing the cargo to London would exceed the cost of taking the same to Bremen.

W. G. F. Phillimore, on behalf of the owners of the cargo, opposed the motion. Affidavits were filed on behalf of the salvors, in which it was stated that if the cargo was forwarded to Bremen it would be greatly depreciated, and that an immediate sale was necessary, and that the best thing to be done was to have the cargo conveyed to London by rail, and there sold.

E. C. Clarkson for the owners, masters, and crews of the English fishing luggers.

SIR ROBERT PHILLIMORE. I think that the duty of the Court in the present stage of the case is clear. The evidence presented to me to-day establishes that this cargo is fast deteriorating through the damage it has sustained by salt water, and that it is for the advantage of all parties that a sale should take place at once. One thing alone is sufficient to induce me to make this order of

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sale, and that is, the owners of the cargo have expressed their wish for the sale, in order that further deterioration may be prevented. And, as I understand the matter, the owners of the cargo press for this sale, even if it should turn out that they are bound to pay freight for the cargo, whether in full or pro ratâ. At present I express no opinion as to whether the owners of the ship are entitled to freight. The shipowners can apply at a later stage of the case for the payment to them of freight, and the question can then be raised in a more formal manner on petition, so that not only my opinion can be taken, but also that of the Court of Appeal. That seems to me to be the right way to deal with the question of law, which is one of considerable importance and difficulty. As the proceeds of the sale of the cargo will be paid into Court, the shipowners will have full security for their claim for freight. I therefore order the sale to take place, and for the purposes of the sale I order the cargo to be brought to London, and I reserve all questions as to freight. (1)

Pursuant to this order the cargo was removed to London, and was sold by auction on the 12th of March, and realized 14,932*l.*

(1) Another cause of salvage, No. 6769, was on the 27th of February, instituted on behalf of the owners, master, and crew of a French lugger, called the *St. Claire*, against the *Kathleen*, her cargo and freight, and a petition was filed in the suit. The salvage suits, No. 6733, and No. 6740, having been consolidated, a petition was filed in the consolidated suit. The petition in cause No. 6769, alleged that the *St. Claire* first fell in with the *Kathleen* after her abandonment, and the crew of the *St. Claire* began to tow her to Boulogne, when the Hastings fishing luggers came up, and the crews of the luggers forcibly dispossessed them. The petition in the consolidated cause alleged that when the Hastings fishing luggers came up to the *Kathleen*, the crew of the *St. Claire* were engaged in stripping the *Kathleen*, and were making no efforts to save her.

The owners of the *Kathleen* and the owners of the cargo filed an answer to the petition in cause No. 6769. The 3rd article of this answer referred to the petition in the consolidated cause and stated in substance, the allegations there made with reference to the alleged misconduct of the crew of the *St. Claire*, and the 4th article of the answer proceeded as follows:

"For the purposes of this answer, but not further or otherwise (the defendants being necessarily ignorant of the actual facts) the defendants herein adopt the allegations in the said petition on behalf of the said English boats contained, and aver that the same are respectively true."

On the 5th of May, *G. Bruce*, on behalf of the plaintiffs in cause 6769, moved the Court to reject the third and fourth articles of the above answer on

An act on petition was subsequently filed on behalf of the owners of the *Kathleen*, which alleged, inter alia, that the cargo had been wet and had suffered damage from sea-water, but the same could have been re-shipped and carried on to Bremen so as to arrive there in a merchantable condition as cotton, and the owners of the *Kathleen* could and were always ready and willing, and desired, and intended to re-ship and carry the same forward, taking due care of it, and using all necessary precautions against its further deterioration, and would have so done, and would have duly delivered it upon payment of freight according to the bills of lading, if they had not been prevented from doing so by the proceedings on the part of the owners of the said cargo.

The act on petition also contained the following averment:—

In the circumstances above stated, the owners of the *Kathleen* submit that they are entitled to the freight which they would have earned by carrying the said cargo on to Bremen, if they had not been prevented from doing so by the intervention of the owners of the said cargo, and their election to take the same out of the shipowners' hands without their consent at an intermediate port, and that they are entitled (subject to the rights of the salvors of the said ship and cargo) to a lien upon the proceeds of the said cargo, now in the registry, in respect of such freight; and if not entitled to the full amount of such freight,

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the ground that such articles were impertinent and embarrassing.

Butt, *Q.C.* and *Aspland* for the owners of the *Kathleen*, and *W. G. F. Phillimore*, for the owners of the cargo, opposed the motion.

SIR ROBERT PHILLIMORE. The only question which I have to decide is, whether the pleadings in the present case are in proper form or not. Now I am clearly of opinion they are not in proper form. The defendants must either elect to leave the matter on the statements of the plaintiffs, not denying their statements, but pleading ignorance of the real state of facts, and leave them to contest with the other salvors their right to recover salvage, or they must positively and directly raise the question of misconduct on the pleadings by alleging misconduct in the plaintiffs as a distinctive allegation made by themselves, the defendants. I am of opinion that the third and fourth articles of the answer must be reformed. The mode of pleading which has been adopted is wholly without precedent in this Court.

In consequence of the decision of the Court, the defendants in cause 6769 filed an amended answer, which, without referring to the pleadings in the consolidated cause, alleged substantive charges of misconduct against the plaintiffs.

June 19, 20, 22. The several salvage causes came on to be heard, and the judge found the charge of misconduct not proved, and awarded salvage reward to the plaintiffs in all the suits.

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that they are not entitled to freight pro ratâ, or to a reasonable remuneration for the carriage of the said cargo from Charleston as aforesaid. By the exertions and expenditure of the owners of the *Kathleen*, in carrying the said cargo from Charleston to Dover, the same was greatly increased in value.

The act on petition concluded with a prayer praying the judge to "declare that the owners of the *Kathleen* are entitled (subject to the rights of the salvors of the *Kathleen* and her cargo) to a lien upon the proceeds of the sale of the said cargo for the freight or other remuneration due to the said owners of the *Kathleen* in respect thereof . . . . to refer it to the registrar and merchants to ascertain the amount thereof, and to direct that (subject to the rights of the said salvors) the said owners of the *Kathleen* shall be paid the amount that may be due to them in respect of the premises out of the proceeds of the said cargo, and to condemn the owners of the said cargo in the costs of these proceedings, and that otherwise right and justice may be administered in the premises."

The solicitors for the owners of the cargo filed an answer to the act on petition.

The answer alleged inter alia as follows:—

The said cargo had been wet and had suffered considerable damage from sea-water. It could not have been re-shipped at Dover. If it could have been re-shipped it would have been only so re-shipped after great delay and with much damage, and it would not have arrived at Bremen in a merchantable condition as cotton. If it had so arrived in a merchantable condition as cotton it would have been as cotton of greatly inferior kind and value. It was proper and necessary, in order to avoid a great depreciation in value, to sell and deliver the said cargo as quickly as possible.

By reason of the premises the owners of the *Kathleen* have no claim against the cargo or the owners thereof for any freight.

The owners of the *Kathleen* did not in any case fulfil their contract to carry the said cargo to Bremen, and are not entitled to any freight, or to any sum in respect of freight, or to any remuneration for carriage of the said cargo.

July 14, 1874. The question as to the right to freight now came before the Court for decision. The affidavits used on the motion to rescind the order for sale were referred to, and additional evidence was given by witnesses examined in Court on behalf of the owners of the *Kathleen*. The fresh evidence given went to support the allegations above referred to in the act on petition.

Milward, Q.C., and *Aspland*, on behalf of the owners of the

Kathleen. The owners of the *Kathleen* are entitled to the full amount of the bill of lading freight. They were always ready and willing to perform their contract, and would have performed it had they not been prevented by proceedings instigated by the owners of the cargo. The owners of the cargo have therefore prevented the owners of the ship earning their full freight: *The Teutonia* (1); *The Soblomsten.* (2) The shipowners had a right to insist upon having the cargo carried forward: *Notara* v. *Henderson* (3); *Dakin* v. *Oxley* (4); *Tronson* v. *Dent* (5); *Great Northern Ry. Co.* v. *Swaffield* (6); *Jordan* v. *Warren Insurance Co.* (7); *Blasco* v. *Fletcher.* (8)

If full freight is not due, pro ratâ freight is due. The owners of the cargo have sanctioned the delivery of the cargo at Dover, and have derived benefit from the sale of the cargo: *The Soblomsten.* (2) The delay and inconvenience occasioned by the excepted perils was not such as to frustrate the object of the adventure, and therefore cannot affect the rights of the parties: *Tronson* v. *Dent* (5); *Cargo ex Argos* (9); *Notara* v. *Henderson* (3); *Cargo ex Galam.* (10)

Butt, Q.C., W. G. F. Phillimore, and *Stubbs.* No freight is due, because the cargo has not been delivered at its port of destination. The owners of the cargo are not responsible for the action of the Court; the Court ordered the cargo to be sold because it was not in a fit state to be carried to its destination, and could not be carried to its destination. No act has been done by the owners of the cargo to raise any implied contract on their part to pay pro ratâ freight: *Vlierboom* v. *Chapman.* (11)

By the abandonment of the vessel the contract of carriage was determined, and all right to freight was forfeited. [They cited *The Tritonia* (12); *The Dantzic Packet* (13); *The Clarisse.* (14)

Milward, Q.C., in reply. The contract of carriage had not

(1) Law Rep. 4 P. C. 171.
(2) Law Rep. 1 A. & E. 293.
(3) Law Rep. 7 Q. B. 225.
(4) 15 C. B. (N.S.) 646; 33 L. J. (C.P.) 105.
(5) 8 Moo. P. C. 419.
(6) Law Rep. 9 Ex. 132.
(7) 1 Story, Rep. 342.
(8) 14 C. B. (N.S.) 147; 32 L. J. (C.P.) 284.
(9) Law Rep. 5 P. C. 134.
(10) Br. & Lush. 167.
(11) 13 M. & W. 230.
(12) 2 W. Rob. 522.
(13) 3 Hagg. Adm. 383.
(14) Sw. Adm. 129.

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been dissolved by the abandonment: *The Aquila* (1); *Thornely* v. *Hebson* (2); *Briggs* v. *Merchant Traders' Insurance Association* (3); *The Propeller Mohawk.* (4)

Cur. adv. vult.

July 22. SIR ROBERT PHILLIMORE. The *Kathleen,* a vessel laden with cotton, coming from Charleston to Bremen, came into collision with a vessel called the *Mallowdale,* on the 24th of January last. The damage which she received induced the master to abandon her; no blame attaches to him on that account; she was abandoned and became a derelict; she was afterwards saved in her shattered condition by certain salvors, English and French, and brought with her cargo into Dover, on the 27th of January. I awarded 3350*l.* salvage remuneration, with certain costs. On the 30th of January I made an order for unlivery of her cargo. On the 9th of February on an affidavit of the owners of the cargo as to the deterioration of the cotton, I ordered a sale to take place. On the 16th of February the unloading was completed. On the 18th of February the shipowners offered to carry on the cotton to Bremen. I ordered the sale, however, at the request of the owners of the cargo, reserving all questions as to freight. The sale took place on the 12th of March. The ship sold for 580*l.* and the cargo for 14,932*l*; the freight claimed is 2081*l.* 16*s.* 1*d.* The money (the produce of the sale of the cargo) has been paid into court; and I am now asked, after payment of the salvage reward, to deduct the freight, amounting to the sum mentioned, before the residue be paid out to the owner of the cargo. Whatever right the shipowner had has been preserved to him, for, as Mr. Justice Story said in the case of *The Nathaniel Hooper* (5): "The possession of the property by the Court through its officers, is a possession protective of the interests of all concerned, and not displacing the rights or lien of any party." It is urged on behalf of the shipowner—first, that the cotton could have been carried on in another ship, and would have arrived at Bremen, though partially injured, in specie. Secondly, that he was willing and ready to carry it on in another ship;

(1) 1 W. Rob. 37.
(2) 2 B. & Ald. 513.
(3) 13 Q. B. 167; 18 L. J. (Q.B.) 178.
(4) 8 Wallace, 153.
(5) 3 Sumner, 542, 553.

thirdly, that the collision was not in any way imputable to him or the consequence of his fault; fourthly, that the collision was one of the excepted perils in the contract contained in the bill of lading. All these propositions are true; it was further urged that it must be presumed that he would have taken proper measures for drying the cotton before it was transhipped. The case of *Notara* v. *Henderson* (1) and *Blasco* v. *Fletcher* (2) were relied upon. It was contended, therefore, that the shipowner was entitled to full freight, or at least to pro ratâ freight. According to the decisions at common law, however, a title to pro ratâ freight may arise out of a new implied contract with the shipowner to which both parties assent. But it was truly observed by Mr. Butt that in this case neither party consented. The shipowner resisted as much as he could the delivery of the goods, and each party stood upon what he considered to be his rights; the shipowner to carry on the cargo, the cargo-owner to receive the goods. Moreover it has been proved by the evidence, that the shipowner demanded full freight. I am of opinion that no pro ratâ freight is due. The only question in truth is, whether the shipowner is entitled to the full freight. I have been referred by the industry of counsel to a great many cases, and they contain valuable principles of law, but in all of them I think the element of mixed fact and law present in this case is wanting.

In this case the vessel was a derelict; in other words, the owner, through his agent, the master, had abandoned all possession of the ship, and at the time of abandonment had certainly lost all rights to freight or to carry on the cargo. It has been urged that the salvors have only a lien for their remuneration, and this is true. But it is also true that they are in lawful possession and cannot be displaced by the owners. When the salvage suit begins the property is placed in the custody of the Court, which is bound to do what is best for it. In this case the Court ordered the sale of the cargo for the benefit of the parties interested. If no claimant appears, the property in the ship would, after a certain length of time, belong to the Crown. Sir John Nicoll, in the case cited by counsel, *The Dantzic Packet* (3), draws the distinction

(1) Law Rep. 7 Q. B. 225. (2) 14 C. B. (N.S.) 147; 32 L. J. (C.P.) 284.
(3) 3 Hagg. Adm. 383.

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between salvage rendered to a ship in distress and to a ship abandoned. "It is different," he says, "in the case of a derelict; there the first occupant has a vested interest and a right of exclusive possession, if alone he can save the property; he takes possession indeed for the benefit of the Crown, in the first instance,—but subject to a liberal remuneration." It is, indeed, true that the original shipowners are allowed a persona standi in this court, and receive the remainder of their abandoned property after the legal charges on it have been satisfied; but the same can be predicated of the owner of the cargo, which, if the contract still subsisted between him and the shipowner, would not be the case; for the ship would have a right to represent the cargo as well as the ship. In fact, the possession of the cargo abandoned by the shipowner vested first in the salvors and afterwards in this Court before it could be restored to the owners. On the whole, I am satisfied that the contingency provided for in the bill of lading, as nullifying the contract, namely, "the dangers of the seas," has happened, and that the original contract between the owners of the ship and of the cargo is at an end. I shall, therefore, grant no freight in this case.

On the 17th of November, 1874, the balance of the proceeds of the cargo was, by order of the Court and after hearing counsel, directed to be paid to the legal holders of the bills of lading of the said cargo.

Solicitors for English salvors: *Clarkson, Son, & Greenwell.*
Solicitors for French salvors: *Deacon, Son, & Rogers.*
Solicitors for owners of the *Kathleen*: *Flux & Co.*
Solicitors for owners of cargo: *Stokes, Saunders, & Stokes.*

[IN THE ARCHES COURT OF CANTERBURY.]

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Dec. 7.

THE OFFICE OF THE JUDGE PROMOTED BY MARTIN *v.* MACKONOCHIE.
(SECOND SUIT.)

Rites and Ceremonies of the Church—Lighted Candles during Morning Prayer —Ceremonial Crossing—Practice—Personal Answers—Singing the Agnus during the Communion Service.

It is unlawful for a minister of the Church of England to use lighted candles on the communion table or on a ledge immediately above the same during the performance of morning prayer when such candles are not wanted for the purpose of giving light; to cause to be said or sung during the performance of the service for the administration of the Holy Communion, after the prayer of consecration and before the reception of the elements by the communicants, the hymn or prayer known as the "Agnus."

Hebbert v. *Purchas* (Law Rep. 3 P. C. 605); *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 365) observed upon.

IN this case the Rev. A. H. Mackonochie, the incumbent and perpetual curate of the new parish of Saint Alban's, Holborn, in the diocese of London, was charged on the complaint of John Martin, of No. 2, New Square, Lincoln's Inn, a member of the Church of England, with having within two years last past offended against the laws ecclesiastical; and the Bishop of London, under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86), without issuing any preliminary commission, signed letters of request in the first instance requesting the judge of this Court to cite the said Rev. A. H. Mackonochie to enter an appearance in this Court and answer to certain articles to be administered to him at the voluntary promotion of the said John Martin. (1) The letters of request were, on the 22nd of May last, accepted by the Dean of the Arches, and a decree by letters of request was ordered to issue. The decree by letters of request was returned into the registry duly executed, but no appearance within the time specified in the rules and regulations of the Arches Court was entered.

On the 2nd of June the proctors for the promoter brought in articles, and an appearance having, on the 19th of June, been

(1) For former proceedings against Mr. Mackonochie at the instance of the same promoter, see Law Rep. 2 A. & E. 116.

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entered by permission of the Court on behalf of Mr. Mackonochie as defendant in the suit, these articles were, on the 2nd of July, amended in certain respects, and admitted to proof in their amended form. The articles, omitting those merely formal, were in substance as follows:—

4. That on Christmas Day, in the year 1873, and on Sunday, March 15th, and Sunday, April 5th, in the year 1874, the defendant used lighted candles on the communion table, or on a ledge immediately above the same during the performance of morning prayer, and, as connected therewith, at times when such lighted candles were not wanted for the purpose of giving light; and also, in his said church, on Christmas Day, 1873, Sunday, December 28th, 1873, and Sunday, April 5th, 1874, caused lighted candles to be carried about, or lifted up by attendants, when not needed to give light in and immediately before the commencement of the Communion Service, and as connected with that service.

5. That on Christmas Day and on Sunday, December 28th, both in the year 1873, and on Sunday, April 5th 1874, after the conclusion of morning prayer, and immediately before commencing the Communion Service, and as connected with such service, and in the presence of the congregation then assembled for such service, he (the defendant) formed, or caused to be formed, and himself accompanied, processions of clergy and others, singing hymns, and marching up and down the aisles or round the interior of the church with lighted candles, a crucifix borne upon a pole and banners (one of such banners bearing a device of a lady standing in a crescent, and representing the Virgin Mary), and that he himself, on the said occasions, then and there wore an alb and cope, with a biretta on his head, and at the conclusion of the procession assumed a chasuble instead of the cope, and immediately, and without any break or intermission, commenced the Communion Service.

6. That on Christmas Day, 1873, and on Sunday, 15th March, and Sunday, 5th April, both in the year 1874, when the defendant was officiating as the principal minister or celebrant in the Office for the Administration of the Holy Communion, he (the defendant) elevated the paten or bread or wafer, and also the cup, that had been respectively placed on the holy table for the Holy Communion, in an unauthorized manner and in a much greater degree than was necessary for the purpose of complying with any of the rubrics or requirements of the Book of Common Prayer and of the Communion Service.

7. That the defendant, in his said church, on divers days and times, to wit, on Christmas Day, 1873, and on Sunday, March 15th, and on Sunday, April 5th, both in the year 1874, when officiating in the Communion Service, wore the following vestments or things, namely, an alb, a cope, a chasuble, an amice or maniple, a stole, and a girdle.

8. That he, the defendant, in his said church, on Christmas Day, and also on Sunday, December 28th, both in the year 1873, and on Sunday, the 15th March, and on Sunday, 5th April, both in the year 1874, when officiating as the principal minister or celebrant in the service for the administration of the Holy Communion, stood, while reading the prayer of consecration in the said service, at the west side of the holy table in such wise that he then stood between the congregation and the holy table with his back to the people.

9. That the defendant, on Christmas Day, 1873, and on Sunday, 15th March, and on Sunday, 5th April last, in the year 1874, in the celebration of the Holy Communion and in the administration thereof to the communicants, used wafer-bread (or flour made in the form of circular wafers), instead of bread such as is usual to be eaten.

10. That on Christmas Day, in the year 1873, and on Sunday, 15th March, and on Sunday, 5th April, both in the year 1874, he, the defendant, during the performance of the service for the administration of the Holy Communion, caused to be said or sung, immediately after the prayer of consecration and before or during the reception of the elements by the communicants, the words, or hymn, or prayer commonly known as the "Agnus," that is to say, "O Lamb of God that takest away the sins of the world, have mercy upon us."

11. That the defendant, on Christmas Day, 1873, and on Sunday, 15th March, and on Sunday, 5th April, both in the year 1874, when officiating in the performance of divine service and of the service for the administration of the Communion (and not of the Office of Baptism) made the sign of the cross by the appropriate gesture of his hand for that purpose.

12. That the defendant, on Sunday, 28th December, 1873, and on Sunday, 15th March, and on Sunday, 5th April, both in the year 1874, when officiating in the performance of divine service and of the Communion Service, kissed the prayer book, or service book.

A responsive plea was on the 18th of July brought in by the defendant's proctor, which alleged that the defendant had been since the 2nd of January, 1863, and was still incumbent and perpetual curate of St. Alban's, and pleaded in substance that the churchwardens of the said parish had never presented or made any complaint against the defendant to the bishop of the diocese or to the archdeacon of the archdeaconry, wherein the said new parish was situated, for having in any degree violated or infringed, or for having neglected to conform to any of the laws, canons, or constitutions of the Church of England; that the bishop of the diocese had never ordered, admonished, or counselled the defendant not to do any of the acts charged against him in the articles; that the present suit was promoted against the defendant contrary to the wish and desire of the churchwardens and parishioners of the parish of St. Albans; and that a great number of the congregation of the said church of St. Albans, many of them being also parishioners, had expressed an earnest desire to the bishop of the diocese that the suit should not proceed, and had protested against the conduct of the promoter. The responsive plea then proceeded as follows:—

The said John Martin is not a parishioner or inhabitant of the said parish of

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Saint Alban's, Holborn. He is promoting this suit at the instigation, and as the agent, and at the cost of a certain society called the Church Association. He has during the past three years endeavoured to intermeddle in the affairs of the said church and parish, and has been always resisted by the churchwardens and parishioners thereof. He is, in fact, a violater of the peace and unity of the church, and liable to ecclesiastical censure, and as such is unworthy of a hearing in an ecclesiastical court.

On the 22nd of June a notice was filed in the registry that the admission of the responsive plea was not opposed, and it accordingly stood admitted. On the same day the proctor for the promoter gave a negative answer thereto, save as regards the allegation contained in the same with respect to the defendant having been and still being the incumbent and perpetual curate of St. Alban's, Holborn, which he admitted to be true.

Aug. 6. On this day *W. G. F. Phillimore*, on behalf of the defendant, moved the Court to direct the promoter to file his personal answers on oath to the responsive plea. He referred to *Farnall* v. *Craig* (1), *Bishop of Norwich* v. *Berney*. (2)

B. Shaw opposed the motion on behalf of the promoter. The old practice of the ecclesiastical courts with regard to personal answers must be considered as shaken by the introduction of vivâ voce evidence into these courts under the provisions of the 18 & 19 Vict. c. 41: Phillimore, Eccl. Law, vol. 2, pp. 1253, 1292, n.; and even before the passing of that Act their use in any particular case was a matter strictissimi juris. To require personal answers from the promoter in the present case, a criminal suit promoted and carried on by virtue of the Church Discipline Act, appears clearly to be contrary to what the legislature intended. Moreover this is an application to the discretion of the Court, because the time for requiring personal answers has expired.

SIR ROBERT PHILLIMORE. This is an appeal to the discretion of the Court, and it is not to be forgotten that that discretion must be exercised judicially. I am of opinion that the 18 & 19 Vict. c. 41 does do away with a good deal of the law of evidence as formerly administered in this Court; and it may be a question of doubt how far the old practice of the ecclesiastical courts in the

(1) 5 No. Ca. 557; 6 No. Ca. 682. (2) 36 L. J. (Eccl.) 8.

matter of personal answers has been modified by recent legislation, —but it is not necessary to express any opinion on this question until I have first considered whether the circumstances are such that I ought to exercise my discretion in the promoter's favour. On consideration of the whole circumstances I am of opinion that I shall exercise my discretion rightly by refusing to grant the motion. I shall give no costs.

Nov. 26, 27. On these days the case was heard. Witnesses were examined orally in court on behalf of the promoter and the defendant respectively. The result of their evidence, so far as is material, is sufficiently adverted to in the judgment of the Court upon the merits of the case. In the course of the case, counsel for the defendant proposed to put in evidence in support of some of the allegations in the responsive plea, a memorial presented to the Bishop of London by members of the congregation and parishioners of St. Alban's, the Court ruled that no evidence with respect to such memorial could be received, and that the memorial itself was inadmissible in evidence.

A. J. Stephens, Q.C. (*Benjamin Shaw* with him), for the promoter. The acts charged against the defendant, as set out specifically in nine of the articles exhibited against him (Articles 4 to 12 both inclusive) all fall under the head of offences contrary to the Acts of Uniformity, the Book of Common Prayer, and the Canons of 1604. They all also, if not expressly, are at least impliedly declared illegal by the decision of this Court in the case of *Sumner* v. *Wix* (1), or the decisions of this Court and the Judicial Committee of the Privy Council in the case of *Martin* v. *Mackonochie* (2), or by the decision in *Elphinstone* v. *Purchas.* (3)

A. Charles, Jeune, and *W. G. F. Phillimore,* for the defendant. The charges made against the defendant in the present suit may be ranged under three heads :—1. Charges in respect of acts done by him, as to the legality of which no judicial decision has yet been pronounced. 2. Charges in respect of acts as to the lawful-

(1) Law Rep. 3 A. & E. 58.

(2) Law Rep. 2 A. & E. 116 ; Law Rep. 2 P. C. 365.

(3) Law Rep. 3 A. & E. 66 ; Law Rep. 3 P. C. 605, nom. *Hebbert* v. *Purchas.*

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ness of which this Court has pronounced in the case of *Elphinstone* v. *Purchas.* (1) 3. Charges in respect of acts as to the lawfulness of which the Judicial Committee have given judgment in *Hebbert* v. *Purchas.* (2)

Under this first head comes the charge made against the defendant of using lighted candles and of elevating the paten and cup. It is submitted that it is merely an inexpressive act to have lighted candles burning during morning service; so burning they are not "ornaments (ornamenta) of the service," but decorations in a general sense, and therefore legal as being things inert, and not used symbolically: *Martin* v. *Mackonochie.* (3) The lighting of candles during the Communion Service was pronounced illegal in the case of *Sumner* v. *Wix* (4), on the ground that such lighting was symbolical and a ceremony. Lighted candles during morning prayer are as allowable as vases of flowers or decorations intended to remain permanently.

The charge of "elevating the cup and paten" in an unlawful manner has not been proved by the evidence adduced. It has been laid down that some elevation is necessary: *Martin* v. *Mackonochie* (5); and the defendant has not been shewn to have gone beyond that elevation which the rubric undoubtedly contemplates.

Under the second head are comprised the charges contained in the 5th, 10th, 11th, and 12th articles, being charges with respect to processions, saying or singing the Agnus during the Communion Service, making the sign of the cross, kissing the Prayer Book. So far as regards the 5th article, it can hardly be contended here, after the decision in the case of *Elphinstone* v. *Purchas* (1), that if the Court should be of opinion that the processions referred to were connected by symbolical acts with the performance of divine service the promoter would not be entitled to have judgment pronounced in his favour. The same observation is applicable to the charge of kissing the Prayer Book in article 12. With respect to the remaining charges under this head, it is submitted that, although the singing the Agnus during the reception of the

(1) Law Rep. 3 A. & E. 66.
(2) Law Rep. 3 P. C. 605.
(3) Law Rep. 2 P. C. 365.
(4) Law Rep. 3 A. & E. 58.
(5) Law Rep. 2 A. & E. 209.

elements by the congregation at the celebration of the Holy Communion has been held an illegal act: *Elphinstone* v. *Purchas* (1); the evidence proves that in this case the Agnus was sung after the reading of the prayer of consecration and at a time when it was subsidiary to the service: *Westerton* v. *Liddell.* (2) It was therefore no more an illegal act to sing the Agnus at that time than to sing the Gloria before the commencement of the Communion Service, or indeed any other hymn. The practice of singing hymns in churches of the Church of England has prevailed for the last two hundred years, and their use comes clearly within the dictum of Lord Stowell in the case of the *Queen's Proctor* v. *Stone* (3), that "what has been allowed in the church must not be condemned in the Court." The defendant is charged in the 11th article with making the sign of the cross when officiating in the performance of the service for the administration of the Holy Communion. The act of making the sign of the cross to the congregation must be admitted to be illegal: *Elphinstone* v. *Purchas* (1); but if, as is consistent with the evidence in the present case, the sign of the cross was made by the defendant as a matter of private devotion, it is difficult to understand how such an act is more illegal than turning to the east during the reading of the creed, or bowing at the name of Jesus. Any act of "due and lowly reverence" (Canon 18) by the minister as one of the congregation ought clearly not to be the subject of prosecution.

Under the third head are included charges of wearing unauthorized vestments, standing at the west side of the holy table, and turning the back to the congregation while reading the prayer of consecration during the Communion Service, and the use of wafer-bread in the celebration of the Communion, as set out in the 7th, 8th, and 9th articles respectively. In relation to these three charges it is impossible to contend that, under the decision given by the Privy Council in the case of *Hebbert* v. *Purchas* (4), this Court might not feel itself bound to pronounce the acts of the defendant as charged to have been contrary to the existing law. A question, however, arises whether, considering that that case was

(1) Law Rep. 3 A. & E. 66, 99.
(2) Special Report by E. F. Moore.
(3) 1 Hagg. Cons. 424.
(4) Law Rep. 3 P. C. 605.

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heard ex parte, this Court is bound to follow the decision. In the case of *Peek* v. *Gurney* (1) the House of Lords were of opinion that the judgment of the Court of Exchequer Chamber pronounced without argument, in a case, *Seymour* v. *Bagshawe* (2), need not have been considered binding by the Court of Exchequer. In the case of *Collins* v. *Lewis* (3) Vice-Chancellor Stuart declined to be bound by the authority of a case, *Hensman* v. *Fryer* (4), decided in the Court of Appeal in Chancery. Again, in the case of *Dugdale* v. *Dugdale* (5), the same case of *Hensman* v. *Fryer* (4), though admitted to be in point, was not followed. If no argument is allowed by the Court, the Judicial Committee of the Privy Council will on an appeal be constrained to hear this case as a court of first instance. It is submitted, therefore, that the facts being as above stated, and in view of the prevalent opinion that the decisions in the cases of *Westerton* v. *Liddell* (6), and *Hebbert* v. *Purchas* (7), and *Martin* v. *Mackonochie* (8) are irreconcilable, this Court ought not to decide against the defendant without hearing the argument which it is desired to offer.

[The Court intimated a wish to hear counsel for the promoter on this point, before hearing further arguments on behalf of the defendant, with respect to the latter class of charges.]

Stephens, in reply on this point. No case has been decided to the effect that an inferior Court can reverse the decision of a supreme Court. The observation to the contrary in the case of *Peek* v. *Gurney* (1) is only an obiter dictum. The decision in *Hebbert* v. *Purchas* (7) has undoubtedly settled that the acts charged against the defendant by the allegations in the 5th, 7th, and 8th articles, are unlawful acts, and the Court will not think it necessary to hear any questions as to their lawfulness argued before it: *Reg.* v. *Glyde.* (9)

Cur. adv. vult.

Nov. 27. SIR ROBERT PHILLIMORE. The 7th, 8th, and 9th

(1) Law Rep. 6 H. L. 377, 396.
(2) 18 C. B. 903.
(3) Law Rep. 8 Eq. 708.
(4) Law Rep. 3 Ch. 420.
(5) Law Rep. 14 Eq. 234.
(6) Special Report by Moore.
(7) Law Rep. 3 P. C. 605.
(8) Law Rep. 2 P. C. 365.
(9) Law Rep. 1 C. C. 139, 144.

articles of charge against Mr. Mackonochie relate to the use of certain vestments or ornaments of the minister, the position of the celebrant before the holy table, and the use of wafer-bread in the administration of the Holy Eucharist.

On former occasions this Court has upon these subjects pronounced judgment favourable to the defendant. The Judicial Committee of the Privy Council has overruled the judgments.

In this state of things an application is now made to me by the counsel of the defendant to hear an argument which has for its object to shew that the decisions of this Court were right, and those of the appellate Court were wrong. The application is admitted to be unusual, but is said not to be unprecedented, and various cases were referred to in support of this proposition. It was urged upon the Court with considerable force that the present case came within the principle of these precedents for several reasons, among others that the judgments of the appellate Court were delivered on the hearing of an ex parte case, and therefore have not the weight of judicial precedent; that the judgments of the appellate Court upon the questions now before me have been conflicting and irreconcilable; that they can be shewn to be founded on mistakes of fact as well as of law.

In these peculiar circumstances it would be competent, I think, to this Court to allow these questions to be re-argued before it, more especially as it appears to me that the judgment of the appellate Court in *Hebbert* v. *Purchas* (1) as to the ornaments of the minister is irreconcilable with the former judgment of the same tribunal in *Liddell* v. *Westerton* (2), and with respect to the position of the minister, irreconcileable with the former judgment in *Martin* v. *Mackonochie* (3); and because, with respect to the use of wafer-bread, I think it probable that if their lordships had not been deprived of the usual assistance of counsel, they would have arrived at a different conclusion. It does not require a long experience in the discharge of judicial duties to be aware of the very great disadvantage under which a Court labours when it is compelled to decide a case, and especially a very important case, upon an ex parte argument. In these circumstances, I think that it

(1) Law Rep. 3 P. C. 605. (2) Special Report by Moore.
(3) Law Rep. 2 P. C. 365.

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would be competent to me to hear now a re-argument of these points. But, upon reflection, I am satisfied that such a course would on the whole be inexpedient and would not further the ends of justice. All these points may be re-argued before the Privy Council, and if there has been any miscarriage of justice in the former decisions of that tribunal, it is fully competent to it to rectify its errors without the intervention of another judgment on the same subjects from this Court. I think it more consistent with the usual practice of Courts, and far more proper, that the argument which it is now sought to address to this Court should be addressed to the Judicial Committee of the Privy Council. I therefore decline to hear it.

Stephens and *Shaw* then replied on the other points in the case. Primâ facie evidence has been given of undue elevation, and it has not been rebutted. [They referred to *Rex* v. *Burdett.* (1)] The burning of candles during the performance of morning prayer is a ceremony, and therefore illegal: *Elphinstone* v. *Purchas.* (2) The Agnus is appointed to be used in one special part of the Communion Service: it is an illegal addition to the service to say or sing it as charged against the defendant. The processions, as the evidence proves, were ceremonies. The defendant is charged with making the sign of the cross when officiating as minister. He was a public person exercising a public office, and the act was therefore illegal in him, though possibly it would not be censurable if done by one of the congregation: [Cardwell's Documentary Annals, vol. i., p. 93; Works of Bishop Hooper, vol. ii. p. 128, edition edited by the Parker Society: *Sheppard* v. *Bennett.* (3)]

Cur. adv. vult.

Dec. 7. SIR ROBERT PHILLIMORE. In this case the office of the judge is promoted by virtue of letters of request from the Lord Bishop of London, presented by Mr. Martin, of 2, New Square, Lincoln's Inn, against Mr. Mackonochie, the incumbent of St. Alban's, Holborn, in the diocese of London.

(1) 4 B. & Ald. 95. (2) Law Rep. 3 A. & E. 66.
(3) Law Rep. 3 A. & E. 167.

The charges contained in these articles were perspicuously and properly arranged by the counsel for the defendant under the following heads:—

1. Acts done by Mr. Mackonochie, as to the lawfulness of which no judicial decision has yet been pronounced.

2. Acts done by Mr. Mackonochie, as to the lawfulness of which this Court has pronounced judgment in the case of *Elphinstone* v. *Purchas.* (1)

3. Acts done by Mr. Mackonochie, as to the lawfulness of which the Judicial Committee have given judgment in *Hebbert* v. *Purchas.* (2)

The 4th article charges—[Here his Lordship read the article.]

The defence set up for this practice was that these lights were not part of any ceremony, and were symbolical of nothing, but merely a permissible decoration—"an inexpressive act," it was said, constituting no ecclesiastical offence. I am unable to justify the legality of their use on this ground; they seem to me to fall within the general principle either of ceremonies additional to those ordered by the Book of Common Prayer, or of ornaments not ordered and not subsidiary to those that are ordered. I must pronounce this practice illegal and this article proved.

The 6th article charges—[Here his Lordship read the article.]

Two witnesses were examined on this article by the prosecution. Mr. Todd, the managing clerk of a solicitor (not a parishioner), but employed to watch the performance of divine service by Mr. Mackonochie, and to report thereupon. He deposed to an elevation of the elements, which would bring the act of Mr. Mackonochie within the letter of the judgment of the Judicial Committee of the Privy Council in *Martin* v. *Mackonochie.* (3) On the other hand, Mr. Layman, who had been churchwarden of the parish, who constantly attended divine service, and who was in church on the occasion as to which Mr. Todd had spoken, and who paid especial attention to the acts of Mr. Mackonochie in this matter, and had from his position a better opportunity of observing him than Mr. Todd, gave a material contradiction to his evidence, while it is to be observed that Mr. Proctor, the

(1) Law Rep. 3 A. & E. 66. (2) Law Rep. 3 P. C. 605.
(3) Law Rep. 2 P. C. 365.

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other witness produced by the prosecutor, was not examined on this point. Upon the whole, I am of opinion that the charge laid in this article is not substantiated by adequate evidence, and I pronounce that is not proved.

The 5th article charges—[Here his Lordship read the article.]

The wearing of the biretta was not illegal, but it was properly admitted by the counsel for the defendant that the whole ceremony as laid in the article and proved by the evidence had been pronounced by me in Mr. Purchas's case to be illegal. I retain the opinion which I then expressed. I pronounce this article proved.

The 10th article charges—[Here his Lordship read the article.]

The evidence proves that this hymn was sung after the consecration of the elements, but not during the reception of them by the communicants. It was contended on behalf of Mr. Mackonochie that the singing of this hymn might be put upon the same footing as the ordinary singing of a hymn before and after the sermon or the singing of the "Gloria" before reading the gospel. But looking to the history of the Prayer Book, and to the fact that this hymn is appointed to be said or sung in a later part of the Holy Communion Service, I am not of this opinion, nor do I see any reason to alter the decision upon this subject which I have already delivered in *Elphinstone* v. *Purchas* (1), within the principle and almost within the very letter of which this act is brought. I pronounce this article to be proved.

The 11th and 12th articles charge—[Here his Lordship read the articles.]

It was properly admitted by the counsel for Mr. Mackonochie that upon the subjects of these two charges generally I had given judgment in the case of *Elphinstone* v. *Purchas* (1), pronouncing the kissing the book and the making the sign of the cross to the congregation to be illegal. The evidence upon the 11th article went beyond this, and further proved that Mr. Mackonochie during the performance of divine service crossed himself. I have considerable doubt whether this charge is specifically laid in the articles. The counsel for the defendant, however, did not take this objection, but contended that there was an essential difference between making the sign of the cross in the air, admitted to be illegal, and the

(1) Law Rep. 3 A. & E. 66.

crossing of himself by the minister not yet pronounced to be illegal. This latter act was said not to be illegal, as not being any part of the service performed by the minister as minister, but an act done by him in his individual capacity as one of the congregation, and it was likened to the act of bowing at the name of our Lord and turning to the east during the recital of the creeds or before the doxology, innocent and edifying practices, it was said, introduced by custom in the services prescribed by the Book of Common Prayer. The adverse contention seems to be that the officiating minister is not allowed to divest himself, during the whole time of performing divine service, of his ministerial character, and, therefore, that an act, which it would be competent to him as a member of the congregation to perform, is not permitted to him while officiating as minister. This proposition seems to me too wide. The more limited proposition would be that it is not competent to him to do any act of private devotion which either conflicts with a direct order of the Rubric or which introduces a new rite or ceremony to the congregation. Upon the former principle the Privy Council found Mr. Mackonochie guilty of "excessive kneeling," when the Rubric ordered him to adopt the posture of standing. Upon the latter principle I admonished Mr. Purchas not to make the sign of the cross in the air to the congregation. But the minister crossing himself as a matter of private devotion does not seem to me to fall under either of these categories, but rather to be of the same character as covering the face with the hands during prayer, or crossing the hands over the breast, or spreading them out, or lifting them up, which I think could not reasonably be contended to be an ecclesiastical offence. Any interference with the liberty of private devotion is beset with difficulties, while public ministrations easily admit of public order respecting them. I am of opinion that the legal offence is proved so far only as making the sign of the cross to the congregation is concerned.

The 7th, 8th, and 9th articles charge—[His Lordship here read the articles.] The evidence produced by the promoter proved, though not very distinctly, the use of the wafer-bread, the position of the minister at the holy table, and the wearing of the vestments; it also proved that these vestments were those in use in the second year of King Edward VI.'s reign. I have already,

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during the course of this trial, given my reasons for refusing to hear an argument from the counsel for the defendant as to the lawfulness of this position, the use of this bread, and the wearing of these vestments. To those reasons I now, without recapitulating them, refer. They must be taken as part of my judgment. I pronounce that the charges laid in these articles are proved.

These articles of charge, with the exception of the sixth, which relates to undue elevation of the elements, being proved, it remains to consider what sentence of canonical punishment the Court should pass. I do not desire to conceal that this question has given the Court considerable anxiety. On the one hand, Mr. Mackonochie is admitted to have disobeyed the sentences both of the Privy Council and of this Court, and is also proved to have contravened the general law with respect to a matter decided for the first time by this judgment. On the other hand, the matters charged relate to no moral or doctrinal offence, but to an excess of ritual observance, beyond that ritual observance which the Prayer Book and formularies of the Church prescribe.

This criminal suit is brought, through the permission of the Bishop of London, by a non-parishioner, who, in a few months' time, when the Public Worship Act (37 & 38 Vict. c. 85) shall have come into operation, will be, on the ground of his being a non-parishioner, disqualified to be a prosecutor. The articles do not contain the averments familar to the Court in these criminal suits —that the parishioners have been offended, or the service of the church unattended, in consequence of the conduct of the incumbent, nor has any evidence been given by any parishioners to this effect. The law with respect to some of the matters charged is in an uncertain state, and with respect to the charges contained in the articles, proved in this suit, Mr. Mackonochie does not appear to have been already the subject of a personal admonition, either from the sentence of a Court or from his diocesan; nevertheless, Mr. Mackonochie must obey the law. He must recognise some authority superior to his own. He cannot make the law for himself, nor out of the existing law select what portions he will obey and what disobey. Upon the whole, I am of opinion that I must pass a sentence upon him of suspension ab officio for six weeks, and I must condemn him in all the costs of the suit except those

incident to the charge of undue elevation, which I have pronounced not to be proved.

It is my duty also to admonish Mr. Mackonochie to desist from the practice mentioned in the articles proved, and to remind him that contumacious disobedience to this sentence may entail, according to the ecclesiastical law, one of far greater severity.

The sentence will be published in the usual manner and form, and take effect from Sunday next. (1)

Proctors for promoter: *Moore & Currey.*

Proctor for defendant: *Brooks.*

(1) The minute of the decree entered in the registry was in substance as follows:—

"The judge having maturely deliberated, by his interlocutory decree, having the force and effect of a definitive sentence in writing, pronounced, decreed, and declared that the proctor for the promoter had sufficiently proved the 4th, 5th, 7th, 8th, 9th, and 10th, and 12th articles given in and admitted in this cause, and had proved the legal offence set up in the 11th of the said articles, so far only as making the sign of the cross to the congregation is concerned, and that the said proctor for the promoter had failed in proof of the 6th of the said articles, that the said Rev. Alexander Heriot Mackonochie, clerk, the party proceeded against in this cause, hath offended against the statute, laws, constitution, and canons of the Established Church of England in the particular manner set forth in such of the said articles or parts thereof as he pronounced to have been proved as aforesaid, and that the said Rev. Alexander Heriot Mackonochie be suspended for the space of six weeks, &c. And the said judge did further by his said interlocutory decree admonish the said Rev. Alexander Heriot Mackonochie to abstain for the future from the practices set forth in such of the said articles or parts thereof as he pronounced to have been proved as aforesaid. And did also condemn the said Rev. Alexander Heriot Mackonochie in the costs of the suit, save those incident to the charge in the said 6th article. Whereupon Brooks, with all due reverence, protested of a grievance and of appealing, and instantly appealed."

1874
July 3.

[IN THE ARCHES COURT OF CANTERBURY.]

IN RE BETTISON.

Faculty for Erection of Schoolhouse on Burial Ground closed by Order in Council —16 & 17 Vict. c. 134—18 *&* 19 *Vict. c.* 128, *s.* 18.

Under special circumstances a faculty may be granted for the erection of a school on a portion of a parish churchyard closed for burials by order in Council.

Port 404
1 P.D. 312.
4 P.D. 50
52.

IN this case an application was made to the Chancellor of Rochester by the vicar and churchwardens of the parish church of St. Nicholas, Harwich, and the members of the national school committee of Harwich, for a faculty to authorize the erection of a school upon a part of the churchyard of St. Nicholas, Harwich.

The petition for the faculty stated in substance as follows:— By an order made by the Education Department on the 21st of August, 1872, in pursuance of the Elementary Education Act, 1870, it was, amongst other things, ordered that additional public school accommodation should be provided for the parish of St. Nicholas, Harwich; and certain other requirements of the Education Department were at the same time made, all of which had been fulfilled. For some time previous to and ever since the date of the order, the national school committee had made every effort to procure a site suitable for the erection of an infant school, but had been unable to find one, owing to the small area of the parish and the density of the population. The only suitable site which could be obtained was the site in question, which adjoined the existing national schools. This site was the south-east corner of the churchyard, and was marked on a plan accompanying the petition. It comprised 1200 square feet, being the amount required by the Educational Department, and about 250 square feet more for yard and offices. The churchyard was closed for burials under the provisions of the Act 16 & 17 Vict. c. 134, in the year 1856. Very few burials had since taken place therein, and none in the ground on which it was proposed to erect the infant schoolroom. There had at no time been many burials in this ground, and none, it was believed, since the year 1828. There were no tombs or monuments on the proposed site. The Education

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Department had approved the proposed site, conditionally on a medical certificate of its healthiness being given; and there was no doubt that such a certificate could be obtained, as the site was perfectly healthy. The national schools already existing and the proposed infant school would be in union with the National Society for promoting the Education of the Poor in the Principles of the Established Church, and had imparted and would impart religious instruction according to the principles of the Church of England.

On the 19th of May, 1874, counsel moved the Chancellor of Rochester to decree a citation with intimation to issue, calling upon the parishioners of St. Nicholas, Harwich, and all other persons interested, to appear and shew cause why the faculty should not be granted.

The learned Chancellor refused the motion, on the ground that he had by law no authority to grant a faculty for the erection of a school on a consecrated burial ground.

The vicar and the churchwardens and the members of the school committee interposed an appeal to this Court; and on the 4th of June, an inhibition and citation issued, citing the parishioners and inhabitants of the parish of St. Nicholas, Harwich, to appear in the registry on the sixth day after service to answer in the appeal and to do and receive as unto law and justice should appertain.

The inhibition and citation was duly served by affixing the same on the church door of the parish church of St. Nicholas, Harwich, on Sunday, the 14th of June, and leaving a copy affixed thereon; but no appearance was entered on behalf of the inhabitants or parishioners.

July 3. *W. G. F. Phillimore* appeared for the appellants, and moved the judge to reverse the decree of the Court below, to retain the principal cause, and to order the faculty to issue. He referred to Phillimore's Eccl. Law, p. 2038, and to 18 & 19 Vict. c. 128, s. 18, and stated that Dr. Lushington had made similar orders. (1) He called attention to the fact that the parishioners had not appeared, and that no opposition existed in the parish to

(1) See *Campbell* v. *Parishioners of Paddington and Others*, 2 Roberts. Eccl. 558); *Harper* v. *Forbes* (5 Jur. (N.S.) 275); *Russell* v. *Parish of St. Botolph* (5 Jur. (N.S.) 300); *Reg.* v. *Twiss* (Law Rep. 4 Q. B. 407).

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the grant of the proposed faculty; and, consequently, that if the Court was of opinion that a faculty might legally issue, the issue of a further citation was, under the circumstances, unnecessary.

SIR ROBERT PHILLIMORE. I am of opinion that the learned Chancellor of Rochester ought to have issued a citation in this cause. I have considered the effect of the 18th section of the 17 & 18 Vict. c. 138, and I think there is nothing in that section to prohibit the erection of the school on the proposed site. It appears from the allegations in the petition for the faculty, that the erection of this school is much required. The prayer of the appellants is that I should retain the cause, and I do not see any reason why I should refuse to grant the faculty.

The minute of the decree, as entered in the registry, was in substance as follows:—

July 3. Clarkson prayed the judge to reverse the decree of the Court below, and to order a licence or faculty to issue authorizing and empowering the appellants, the members of the national school committee, to erect upon a part of the churchyard of St. Nicholas, Harwich, marked A. in the plan deposited in the registry of the Court below, an infant school with a yard and out-offices, in which school religious instruction will be given according to the principles of the Church of England. The judge having heard counsel thereon, by his interlocutory decree, having the force and effect of a definite sentence in writing, pronounced for the appeal and complaint made and interposed in this cause on behalf of Clarkson's parties, reversed the decree or order of the Court below, retained the principal cause or application, and directed a licence or faculty to issue under the seal of this Court authorizing and empowering the Rev. W. J. Bettison, clerk, vicar of the vicarage and parish church of St. Nicholas, Harwich, in the county of Essex, diocese of Rochester, and province of Canterbury, William Groom, one of the churchwardens of the said parish, Francis Hales, Oliver John Williams, Thomas George, Richard Saxby Barnes, and Francis Richard Hales, members of the national school committee of Harwich aforesaid, to erect upon the part of the churchyard of St. Nicholas, Harwich, aforesaid, marked A., an infant school, with a yard and out-offices, in which school religious education is to be given according to the principles of the Church of England.

On Thursday, the 15th day of July, the proctor for the appellants filed a notice in the registry praying the faculty, and on the same day the faculty issued.

Proctor for the appellants: *Clarkson.*

[IN THE ARCHES COURT OF CANTERBURY.]

1874
Aug. 6.

BOYD AND OTHERS *v.* PHILLPOTTS.

Appeal from Visitation by Bishop as Ordinary—Jurisdiction—Appellate Jurisdiction exercised by Judge of the Arches—Power of the Bishop of the Diocese over the Fabric of the Cathedral Church of Exeter—Reredos—Legality of Carved Images not on any Tomb or in any Painted Window—3 & 4 Edw. 6. c. 10.

A carved stone structure or screen at the back of the holy table, called a reredos, was erected in Exeter Cathedral by the Dean and Chapter of Exeter. On the structure were sculptured representations, in bas-relief, of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the day of Pentecost, and figures of angels, and the screen was surmounted by a cross.

The Bishop of Exeter, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed:—

Held, by the Court of Arches, that it had jurisdiction to entertain an appeal from the judgment of the bishop:—

Held also, that the structure was not illegal; that if it were illegal, the bishop had not jurisdiction to order its removal.

Reversed 1 P.C. 435

THIS was an appeal from a judgment of the Bishop of Exeter, pronounced at a visitation of the cathedral church of Exeter.

On the 10th of July, 1873, a petition was presented to the Bishop of Exeter by the Venerable William John Phillpotts, Chancellor of the Diocese, Archdeacon of Cornwall, and Prebendary of the Cathedral of Exeter. The petition was in substance as follows:—

The humble petition of William John Phillpotts, Prebendary of Exeter Cathedral, and Archdeacon of Cornwall, prayeth that your lordship would exercise your power as visitor of the Cathedral of Exeter, visit the dean and chapter of the Cathedral of Exeter aforesaid, and inquire into the recent erection of a reredos in the choir of the said cathedral church, with certain images thereon, not being either upon any tomb or in any painted window, such erection having been made without your lordship's consent, and the images aforesaid so placed being in themselves contrary to the laws ecclesiastical of this realm, as your petitioner when called upon is ready to prove, and further prayeth that on such proof being made clear to your lordship's satisfaction you will order the removal of the images aforesaid, and the substitution of the Ten Commandments in their stead.

In consequence of this petition the Bishop of Exeter issued a citation. The citation stated that the bishop had received the petition, and that he purposed, by virtue and in exercise of the

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jurisdiction, powers, and authorities vested in him as visitor of the cathedral church of Exeter, and of the dean and chapter thereof, to hold a visitation of the said cathedral church and the said dean and chapter, for the purpose of inquiring into the allegations of the said petition, and cited the dean and canons of the said cathedral church to appear on the 7th of January, 1874, in the chapter house of the said cathedral church in person respectively, to answer certain articles of inquiry touching the matters complained of in the said petition, to be administered to them by the bishop as visitor of the said dean and chapter and of the said cathedral church. (1)

The articles of inquiry were annexed to the citation, and were signed by the Bishop of Exeter and sealed with his seal. They were in terms as follows:—

Articles to be administered to the Very Reverend the Dean and Canons of our cathedral church of Saint Peter in Exeter by us the Right Reverend Father in God, Frederick, by Divine permission, Lord Bishop of Exeter, at our episcopal visitation of our said cathedral church, and of the said dean and chapter, to be held on the seventh day of January, one thousand eight hundred and seventy four, at the hour of ten in the forenoon, in the chapter house of our said cathedral:

Article 1.—Is there a reredos in the choir of our said cathedral church? If there is a reredos in the said choir, when was such reredos erected?

Article 2.—Are there any images on such reredos? What is the nature or description of such images? When were such images erected or placed there?

Article 3.—Was the said reredos erected in the choir of our said cathedral church under any legal authority?

Article 4.—Were the images on the said reredos erected or placed there under any legal authority?

Article 5.—Is the retention of the images on the said reredos sanctioned by the laws ecclesiastical?

On the 7th of January, 1874, the visitation was held by and before the Bishop of Exeter, assisted by the Honourable Mr. Justice Keating as his assessor, in the chapter house of Exeter Cathedral. The petitioner appeared, and W. F. Phillpotts appeared as counsel on his behalf.

The respondents appeared, but under protest, and Dr. Deane, Q.C., and W. G. F. Phillimore, appeared as counsel on their behalf.

(1) The citation contained an intimation that both the petitioner (the Venerable William John Phillpotts) and the dean and canons would be heard at the visitation by counsel or in person.

The respondents refused to answer the articles of inquiry on the ground of want of jurisdiction in the bishop. With the approval of the bishop and the learned judge his assessor, it was arranged by consent that the question of jurisdiction should be first argued, and that if the bishop should be advised that he had jurisdiction, the question of the lawfulness of the reredos and the sculptures thereon should be then argued, and that all rights of appeal should be reserved to the respondents.

The question of jurisdiction was accordingly argued by counsel.

On the 8th of January the visitation was continued; and Mr. Justice Keating having announced that he had advised the bishop in favour of his jurisdiction, delivered his opinion on that point as follows:—

KEATING, J. I have advised the bishop to continue this visitation. Acting merely as his assessor, I might be satisfied with simply giving that advice; but I do not think such a course would be respectful to the very able arguments which I have heard on both sides. I think it is more proper to state to you shortly the grounds upon which I have tendered that advice to the bishop. What is the jurisdiction of the bishop? was the question with reference to the articles exhibited and the citation that has been served upon the chapter. Now, I do not understand that seriously the right to visit the cathedral in some capacity by the bishop was disputed. No doubt it was suggested that the cathedral was a peculiar within the jurisdiction of the dean; but I do not think that either in law, and certainly according to the evidence, there is any foundation for supposing that that at any time was the case. It would have been a strange state of things if it had been. In the report of the case which was tried in the Court of Queen's Bench, and in which the chapter of this cathedral succeeded against the Crown with reference to the election of a dean—establishing their right in the Court of Queen's Bench to elect their dean by licence from the bishop, whereupon an Act of Parliament was passed taking away from them that power, and transferring the power of appointment to the Crown, so that at present the dean is appointed by the Crown—I find the origin of the deanery of this church stated. (1) It is a work of some authority, because it proceeded from the then chapter clerk of this cathedral, Mr. Ralph Barnes, whom everybody connected with Exeter very well knew to be thoroughly conversant with all the records of the chapter. He says there that the deanery was founded with the consent of the chapter, by William Brewer, Bishop of Exeter, in 1225; and by the charter of foundation one of the canons was to be elected by the chapter to be dean under the bishop's licence to elect, subject to the bishop's consequent right of confirming the election. Therefore undoubtedly the bishop, who was the founder of the dean as it were, reserved to

(1) Report of the case of *The Queen v. The President and Chapter of the Cathedral Church of St. Peter in Exeter*, regarding the Deanery of Exeter, by Ralph Barnes, chapter clerk, 1841. Introduction, page ii.

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himself the power of giving a previous licence and a subsequent confirmation. The form of election adopted in the earliest times in conformity with the foundation had been continued to the present day. Therefore it would unquestionably have been a strange state of things if it could have been established that a dean so appointed nevertheless had the control over the cathedral of the diocese so as practically to exclude the bishop, who is the founder. That state of things, however, which would have been so strange if established, we really have no ground for supposing, as a matter of fact, ever existed, or that the dean ever made such a claim; or that such a claim ever occurred, so far as I can discover in the evidence, until that ingenuity to which we are all so much indebted, suggested the argument—because it was more a matter of argument than a statement of fact. The first piece of evidence in point of date which was referred to was the materials collected, or supposed to be collected, from the case of *Parham* v. *Templar*. (1) Of course it must be conceded on all sides that that case itself has nothing whatever to do with the present question. That was a case in which a dispute arose in reference to a seat in a parish church, such parish being confessedly a peculiar of the dean and chapter. The Dean and Chapter's Court decided it in one particular way. One of the parties appealed to the Consistorial Court, and the other more properly appealed to the Dean of Arches. The question, and practically the only question, there was, whether the Consistorial Court or the Arches Court was the proper Court of Appeal from the decision of the dean and chapter, and Sir John Nicholl, if I may venture to say so, most properly decided that the proper Court of Appeal was the Arches Court. It would have been a monstrous thing where a matter arose within an undoubted peculiar of the dean and chapter, that there should be an appeal to the Consistorial Court of the bishop. But it was supposed that the composition which had been alluded to in that case affected the present question. Now I cannot discover, considering what subsequently took place, that anything in that composition can be of the slightest importance. It is remarkable, rather, that it was put forward in that case by the party insisting upon the jurisdiction of the Bishop's Court. That, of course, would not necessarily affect any legal consequences arising upon it; but I cannot discover anything in that document which would affect any right of the bishop to visit this cathedral, nothing which decided that the dean and chapter had any power to exclude the bishop from such a visitation. That took place in the year 1616; and really I think that when dates are looked to in this case, there cannot be a question upon this subject. Now in reply yesterday Dr. Deane alluded to what was alleged to be a visitation by Archbishop Laud. But the document when referred to did not shew a visitation by Archbishop Laud at all. It shewed that Archdishop Laud issued certain injunctions from his palace at Lambeth with reference to certain arrangements in the diocese of Exeter, one of the dioceses within his province. Whether Archbishop Laud was justified in issuing these injunctions or not is not at all material to the inquiry. He was, no doubt, a person who would not be slow to strain any prerogative which he possessed; but we have no reason to impugn his right to do what he did upon that occasion. But that does not affect the present question. That which took place in 1639 could have nothing to do with it except for the purpose of shewing that at that

(1) 3 Phillim. Eccl. 223.

date the right of visitation of the cathedral was not in the bishop but the archbishop. So far from that being the case, or even from Archbishop Laud's thinking so, in 1662 we have a visitation by the bishop as diocesan. Now that visitation record, which is produced, is very important, for this reason—that the right of the bishop to visit here does not seem to depend simply upon claims made but not acquiesced in, leaving the matter in any doubt; this right not only to visit but to deal with the fabric is not left in any doubt, because we have the original record existing of the visitation in 1662, in which the bishop exhibited articles inquiring with reference to the fabric. Well, what was done? If that had been a mere inquiry, and nothing more had been done, there might be some colour, perhaps, for saying that it left the matter in doubt. But here are the answers to these articles under the hands of the dean and canons, answering these questions, these inquiries with reference to the fabric. That is afterwards repeated in 1665 and in 1679. I think these are the only three cases in which the records have been preserved, and that that should be so is not very extraordinary. Indeed the wonder is that these three should be preserved in the state in which they are; evidently it shews that great care must have been used in their preservation. But there is no record of any subsequent visitation. That fact, unaccompanied by any explanation, would no doubt be a circumstance that one would inquire into, and consider how it was that no visitation had since taken place—if none did take place—of which I am by no means sure. Well, it is explained in this way, that in the year 1709 the bishop of the diocese held a canonry in commendam as also the treasurership of the chapter, and being one of the chapter, occupied the anomalous position that had he visited he would in truth have been visiting himself. That will reasonably, I think, account for the absence of visitations of the cathedral for so long a period. It is not likely that any would be required—not in the least likely. Of course everything that was done by the chapter was done with the concurrence of the treasurer, being one of the canons and also bishop of the diocese. It was not at all likely that any occasion which arose would for a single moment require a visit. He knew as much about the repairs of the cathedral, and as to what was being done, as any other of the canons, and, therefore, no necessity would arise for any visitation on the part of the bishop. And this, it seems to me, will fully account for that very long interval which, unexplained, indeed, would be a very remarkable circumstance, and for the fact of no record of any visitation having taken place. In 1848 the Order in Council was made which abolished the peculiars. (1) It was upon the existence of these peculiars that, in truth, the very able argument which Mr. Phillimore has presented was principally founded. But these peculiars were abolished by the Order in Council of 1848; and in that Order in Council express reservation is made of the state of things which previously existed with respect to the visitation of this cathedral church. It was suggested that that was because there was a doubt about the right of the bishop to visit, and that it was advisedly introduced. Now I am quite sure, and probably nobody could judge as to how far the observation is correct better than Dr. Deane himself—who now acts for the Crown—that if a suggestion were made to reserve that, that would reserve it, because it was the object of the Order in Council not to deal with anything but the peculiars that

(1) Ecclesiastical Commissioners: Orders in Council, vol. vi. p. 135.

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were proposed to be abolished. But it may be, and I think it very probably was so, that it was a usual form to adopt, at least it would not have been an unnatural form. I do not see why the Order in Council should in any way interfere with the visitation by the bishop of the cathedral. It is quite dehors the purview of such an Order in Council. And even giving it the fullest effect, supposing for a moment that it had been suggested by somebody that the right of the bishop to visit the cathedral might be a matter of doubt, that cannot have been understood by the dean and canons of the cathedral. It is impossible that the dean and chapter either should argue or seek to exclude the bishop from the cathedral, for I cannot find the slightest evidence for all time that the dean has ever asserted any such right as existing in him. It is clear that neither the dean nor the canons put any such construction upon that exception, if it be an exception, in the Order in Council, because a Royal Commission issued four years afterwards—when the matter was fresh therefore in the recollections of everbody—in the year 1852. Now I must say that it seems to me that if there had been any doubt about the matter, which I am unable to discern, it would have been put an end to by what took place upon that occasion. Questions are addressed to the dean and chapter, requiring from them information on this very subject. Of course it was the duty of the dean and chapter, in answering those questions, to do so in the fullest and most unreserved manner. And I have not the slightest doubt that the dean and canons of this cathedral did perform that duty scrupulously and exactly. And how did they answer? Why they answered by saying that their visitor was the bishop, and that they were not aware that any fixed period of visitation had been followed, which was perfectly correct. But the bishop was their visitor; and no reservation of the right of the bishop to visit is even hinted at in the answers of the dean and chapter. It would be out of all reason to suppose that they did at that time seriously entertain any doubt as to the right of the bishop, or ever intended in any way to vindicate such a right. That being so, it seems to me that the right of the bishop to visit this cathedral, with all those rights that belong to an ordinary episcopal visitation, exists at the present time. And that being so, it of course becomes my duty, acting as assessor to the bishop, to give his lordship that advice which I have. His lordship has accepted that advice, and proposes to proceed with the visitation. I wish to say, at the same time, that, it having been supposed, as it appears to me, not upon any good or sufficient grounds, that a wish existed, either upon the part of the bishop or of his professional adviser, to in some way exclude the dean and chapter from the right of taking the opinion of the highest Court in the kingdom with reference to the propriety of the course that the bishop would adopt, I cannot help thinking there was no real foundation for that suggestion or that apprehension, because it is the desire of the lord bishop—I speak in his presence what I conceive to be his opinions and sentiments—not to extend his jurisdiction unwarrantably or improperly, whilst it is his bounden duty to retain and vindicate the jurisdiction properly belonging to his office. But to put the matter beyond doubt the bishop proposes not to come to a conclusion with reference to the matters submitted to him, unless he should be requested by counsel—counsel on either side—to proceed differently, until the dean and chapter shall have had full opportunity of taking any course that they may think fit, in order that if the advice given to the bishop on this occasion be wrong it may be set right. Nobody knows better than Dr.

Deane, the learned counsel who leads for the dean and chapter, that no possible prejudice can in that event accrue to the dean and chapter in the vindication of any right they may suppose themselves to possess in the matter. What the lord bishop proposes to do is to continue the present visitation; and having obtained all the materials which the assistance of counsel can furnish me with for the purpose of advising his lordship, and also his lordship himself, for the purpose of considering the question, that such an adjournment should take place as would give ample time to the dean and chapter to take the advice of their learned counsel as to the course they ought to adopt in the matter. At the same time, of course, the bishop will be open to hear any other suggestions which may be made for the purpose of carrying out that which his desire is, namely, that the dean and chapter should not for a single moment suppose that he has any desire unduly in any shape or way to extend his jurisdiction contrary to law, contrary to the duties of his office. Therefore, if it is the intention of the learned counsel to proceed with the further consideration of the matter, I assume that the lord bishop will be ready to hear them.

Immediately on the delivery of the above opinion the dean and canons of Exeter put in their answers to the articles of inquiry as follows:—

1.—There is a reredos in the choir of the said cathedral church. Such reredos was begun to be erected on 23rd January, 1873, and is not yet completed.

2.—There are on such reredos sculptured representations, in bas relief, of the three following historical scenes, that is to say, the Ascension of our Blessed Lord, the Transfiguration of our Blessed Lord, and the Descent of the Holy Ghost on the Day of Pentecost. There is an angel at each side of the reredos, and two other angels, one on each side of the cross which surmounts the reredos. All these articles were cut or carved out of the actual structure during the progress of the reredos.

3.—Yes.

4.—The reredos, as described above, was placed under legal authority.

5.—The retention of the reredos in its present unfinished state, and when completed, is sanctioned by the laws ecclesiastical.

Signed under protest, reserving to ourselves the right of appeal, and of applying for a prohibition.

Archibald Boyd, Dean; F. C. Cook, Precentor and Canon; E. C. Harington, Chancellor and Canon; Philip Freeman, Archdeacon of Exeter and Canon; Henry Woolcombe, Archdeacon of Barnstaple and Canon; Sackville Lee, Canon.

7th January, 1874.

After these answers had been read, W. F. Phillpotts was heard in support of the petition.

Dr. Deane, Q.C., and W. G. F. Phillimore, contrà.

The arguments were continued on the 9th of January, and on that day, judgment having been reserved, the visitation was adjourned.

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April 15. The visitation was proceeded with, and the following opinion of Mr. Justice Keating was read by the Bishop of Exeter :—

The visitation was held in consequence of a petition presented to the Bishop of Exeter by the Venerable William John Phillpotts, Prebendary of the Cathedral Church of Exeter, Archdeacon of Cornwall, and Chancellor of the Consistory Court of the Diocese, praying the bishop to exercise his power as visitor of his cathedral of Exeter, to visit the dean and chapter, and to inquire into the recent erection of a reredos in the choir of his said cathedral church, with certain images thereon, not being on any tomb, or in any painted window, such erection having been made, as alleged, without the bishop's consent, and the images aforesaid so placed being in themselves contrary to the laws ecclesiastical of this realm, and praying, that on proof thereof being made clear to the bishop's satisfaction, he would order the removal of the images aforesaid, and the substitution of the Ten Commandments in their stead.

A citation was accordingly issued to the dean and canons, requiring them to appear on the 7th of January then next, and answer certain articles annexed to the citation, touching the matters of the petition.

On the day appointed, the petitioner appeared with his counsel, and the dean and canons also appeared with their counsel, under protest, however, that they were not bound to appear, as the bishop was not visitor of the cathedral, and had no jurisdiction in the matters alleged in the petition.

This question was argued by the counsel on both sides at considerable length, and evidence given. It appeared to me that the evidence clearly established the right of the bishop to visit his cathedral, and the fabric thereof, and for the reasons which I then stated, and which it is not necessary here to repeat, I advised your lordship to overrule the objection to your jurisdiction, and to proceed with the visitation, which was done accordingly. The answers of the dean and canons cited were then put in under their hands, and upon them, with reference to the allegations in the petition, two questions arose which were argued with great learning on both sides.

The first question was, whether what was done in and about the erection of the reredos, could legally be done without a faculty, or other consent of the bishop, and secondly, whether the placing, and continuing thereon the images complained of, was contrary to the laws ecclesiastical. Upon both these questions I took time to consider, and have given to them all the attention in my power, and which they so well deserve.

As to the first question, namely, how far a faculty or other consent of the bishop was necessary, the facts appeared to be as follows. There was no evidence that any faculty had ever been applied for, or issued for any works connected with the cathedral, nor was there any evidence given that prior to the year 1823, anything had been done to the cathedral, which, if done in an ordinary parish church, would have required a faculty, such alterations, if any, which would have required a faculty, could only have been inferred from lapse of time, which doubtless rendered it probable that such works at some time must have been executed. It is to be observed, however, that from 1709 to 1869, the bishops of Exeter were also canons and treasurers of the cathedral, so that any works done during that period would have probably been done with their know-

ledge and concurrence, and so have been thought to render a formal application for a faculty the less necessary.

The reredos taken down in order that the present one should be substituted, was erected in 1823. It consisted of a solid screen, in compartments, with Gothic ornaments extending across the whole of the east end of the choir, immediately under the great east window of the cathedral, with the Ten Commandments placed in the two centre compartments over the communion table, according to the canon (1) and the advertisements of Queen Elizabeth.

There was no evidence that the reredos was at all out of repair, but it was recently removed entirely, and the present reredos erected, not extending wholly across the choir, but only occupying about the space required for the communion table in the centre, the rest of the space on each side being occupied by an open grated work admitting a view of the Lady Chapel beyond. There were no means, consistently with the preservation of the architectural design of the reredos, of placing the Ten Commandments upon it or over the communion table, but it was stated by the counsel for the respondents to be the intention of the dean and canons to comply in that respect with the requirements of the canon, by replacing the Ten Commandments somewhere on the east wall, whilst the authority of the advertisements which direct them to be placed "*over the table*," was denied by their learned counsel. There seems to be, however, no doubt that they are of binding authority, Cardwell, Documentary Annals, vol. i. p. 321, ed. 1844, where the matter is discussed and the authorities collected, and see also *Hebbert* v. *Purchas.* (2) As, however, the Judicial Committee in the case of *Liddell* v. *Beal* (3) held that the requirements of the law can be fulfilled in some cases, without placing the commandments over the table, provided they are so placed as to be read by the people, it must, I think, be taken to be the intention of the dean and canons so to place the commandments as to be a compliance with the law. That what was thus done constituted an alteration, which in the case of an ordinary parish church would have required a faculty, was not disputed, but it was insisted that the dean and five residentiary canons have absolute control over the fabric of the cathedral, and can make any alterations therein without or against the consent of the bishop and the rest of the chapter, and subject only, if at all, to the visit of the metropolitan. This makes it necessary to examine the original foundation of the Cathedral of Exeter, and of the dean and canons who thus claim the exclusive control over it, subject only as aforesaid.

In 1840, the Crown having claimed the right to appoint to the deanery of Exeter as a donative, obtained a rule for a mandamus from the Court of Queen's Bench to "the President and Chapter of the Cathedral Church of Saint Peter, Exeter," commanding them to proceed to the election of the nominee of the Crown, as dean of the cathedral, cause was successfully shewn against that rule on behalf of the chapter, and it was discharged. The appointment is now vested in the Crown by Act of Parliament. A report of the case was published by Mr. Ralph Barnes, then and for many years chapter clerk, and the facts connected with the foundation of the deanery are thus stated in the judgment of the Court: "The bishopric," said Lord Denman, delivering the judgment, "was founded

(1) Canon 82.

(2) Law Rep. 3 P. C. 606, 643.

(3) 14 Moo. P. C. 1, 15.

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before the Conquest. There were twenty-four prebendaries, all in the bishop's gift. The bishop of the diocese founded the deanery, and endowed it in the reign of King Henry the Third, in the year 1225. By the charter of foundation, the dean is to be elected by the chapter from among the prebendaries, the licence of the bishop being first obtained, and subject to the confirmation of the bishop and his successors. At a subsequent time by a new statute, the chapters were divided into canons residentiary, and prebendaries, the residentaries being elected by the chapter from among the prebendaries, and the practice from that time has always been that the dean should be elected from among the canons residentiary. The course has been for the bishop to issue a licence to elect, and the canon elected has been presented to the bishop, who confirms the election, if all has been regular, —the dean elect then takes the oath of canonical obedience to the bishop, who sends his mandate to the chapter to instal him." (1)

The chapter clerk, in his introduction to the report of the case, states that the chapter of Exeter in its original foundation, consisted of twenty-four canons established there on the see being fixed at Exeter in 1050, that the form of election of dean, as above, was continued to 1840 from the foundation in 1225, and that the office of dean was expressed to be of pre-eminence only, the dean having no other voice or share in the chapter than a simple canon.

This case, therefore, appears to furnish the most authentic account of the foundation of the dean and chapter. The canons residentiary, including the dean, now consist of six, and are called the "minor chapter."

As to the fabric of the cathedral, if a work referred to by the counsel on both sides can be relied upon, namely, "Oliver's History of the Cathedral of Exeter," it would appear that the structure owes its origin and development largely, if not principally, to the munificence of successive bishops, and the connection between the bishops and their cathedral seems always to have been close and intimate. Their consistorial court and muniment room are within it. The throne is found as usual in the cathedral, and an ancient door of communication between the palace and the church, which has always been used, still exists.

There is nothing, therefore, in the constitution of the dean and canons, or in the circumstances of the cathedral, that would seem to establish any exceptional state of independence on the part of the dean and canons of the Cathedral of Exeter in relation to their bishop. Whilst, on the other hand, the claim of exemption from all control by the bishop with reference to the fabric of the cathedral seems altogether opposed to the evidence of ancient visitations by the bishops before they became themselves canons and treasurers of the cathedral. In those cases, some of which were proved, articles as to the state of the fabric were exhibited to the dean and canons, and answers under their hands put in to such articles without any protest or attempt to impugn the right of the visitor, or do otherwise than submit to the jurisdiction, which now I understand to be denied; and it would certainly seem remarkable that a power should exist to exclude the control of the bishop over the church, which is the parish church of the whole diocese, which is usually, in all formal documents, called "his" church, and which, without a bishop, could not exist as a cathedral.

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(1) *Reg.* v. *The President and Chapter of Exeter Cathedral*, Special Report, p. 132.

How far in some cathedrals the control of the bishop may be limited by statute or usage, I have no means of judging, but none such as affecting the Cathedral of Exeter was produced before me. The case of *Parham* v. *Templar* (1) was referred to by the counsel for the dean and canons, in which Sir John Nicholl held that an appeal from the Court of the Dean and Chapter of Exeter, would in their peculiar, which was exempt from the visitation of the bishop, who had no concurrency of jurisdiction, lie, not to the Diocesan Court in the first instance, but direct to the Court of Arches. He considered that the statute of 24 Hen. 8, c. 12, did not apply to peculiars, and even if it did, would not include deans and chapters who were not named in it. The decision itself, avoiding as it did the multiplication of appeals, was, if I may venture to say so, faultless, but all his expressions in that case were, I apprehend, intended, and must be taken with reference to the subject before him, which was a question of jurisdiction as to peculiars, and did not apply to the general jurisdiction of the bishop over his cathedral, or over the dean and chapter.

Peculiars, "not royal," have now been abolished, and the order in council doing away with peculiar jurisdictions within the diocese of Exeter, leaves the visitatorial powers of the bishop untouched. It is quite true that the dean and chapter are said to form, as it were, the council of the bishop in cases of difficulty, that they must have assented to any grants of land by the bishop so as to have bound his successors, and that the bishop was elected by them. Legislation, however, has somewhat altered the substance of their relations, which, even whilst they existed in full force, in nowise prevented the general control of the bishop over his church and chapter, so as to justify important alterations in the cathedral without a faculty, which is the only strictly legal mode in which the bishop can signify his assent to them. In the case of the *Churchwardens of Saint John, Margate*, v. *The Parishioners, Vicar, and Inhabitants of the Same* (2) an application was made to Sir William Scott, as official of the Archdeacon of Canterbury, at that time by ancient composition exercising episcopal jurisdiction, for a grant of a faculty to erect an organ in the parish church under peculiar circumstances.

In the course of his judgment he said: "It may be difficult indeed in some cases to distinguish whether an addition of this kind to the service of the church is to be deemed necessary or ornamental; . . . In cathedral churches they would, I conceive, be deemed necessary, and the ordinary might compel the dean and chapter to erect an organ as usual and necessary for the service usually performed in such places." That the dean and chapter of a cathedral church is subject to the control of the bishop, with reference to the service of that church, would seem, therefore, to have been the clear impression upon the mind of that eminent judge.

Indeed, the reason which requires the sanction of a faculty for alterations in a parish church, appears to be also applicable to the case of a cathedral church. If it be right in the case of a parish church that the parishioners should have notice of proposed alterations, so as to enable them to bring forward any well-founded objection they might have thereto, it is not easy to see upon what ground those who have a right to worship in a cathedral, not only all the members of the chapter, but the other inhabitants of the city and diocese, should be deprived of that opportunity.

(1) 3 Phillim. Eccl. 223. (2) 1 Hagg. Cons. 198.

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Doubtless in a parish church the rates upon the parishioners might formerly have been affected by an alteration, so as to render previous notice the more necessary, but that was clearly not the only ground for the necessity for a faculty, which, since the abolition of church rates, still requires the same formalities.

That the dean and canons, therefore, should be free from all control in dealing with the cathedral seems difficult to conceive, and if subject to any control, what is that control? It has been stated that, if subject to any control, it is to that of the archbishop alone—of course the archbishop has a general control over every diocese within his province, but that he has any special control, in the first instance, as to alterations in the Cathedral of Exeter, excluding the control of the bishop, was not shewn by any evidence adduced before me.

Certain orders by Archbishop Laud, concerning the dean and chapter, were relied upon for that purpose, but when examined do not appear to support the view of the respondents. They are awards made by the archbishop concerning disputes as to lettings and renewals of leases within their separate manors and lands, which had been referred to him by consent, and as to which, I apprehend, the bishop could have had no jurisdiction whatever. The archbishop, by such consent, directs a percentage of the fines to go towards the creation of a fund for repairing and maintaining the cathedral, which the dean and chapter were bound of common right to repair. The accounts of the distribution of the fund are directed to be furnished to the bishop, and if any question arise which the bishop is unable to settle, then reference is to be made to the archbishop. The bishop and his chancellor are also prayed and required to prevent any encroachments on the church and churchyard, and if he cannot possibly remedy such, then the names of the offenders are to be furnished for proceedings against them in the High Commission Court. The date of these orders is June, 1639; another dated in the same month, in which two canons referred their dispute as to the right to a cathedral office to the award of the archbishop, who made an award accordingly, was also referred to.

I do not see that those orders or awards in any way affect the right of the bishop to visit his cathedral and the fabric thereof, and accordingly we find that there are records of subsequent visitations by the bishop, in which answers by the dean and chapter, as to the fabric of the cathedral, were given, as already mentioned; but what appears to me a very strong piece of evidence against the claim now made on behalf of the dean and canons is to be found in the answers of the dean and chapter to the questions put to them by the Royal Commission in 1852. They state in those answers "that the Bishop of Exeter is the visitor of the cathedral:" That "the powers of the visitor are those vested in him by the general law, *not modified by any special custom*:" That he is the sole interpreter of the statutes, and that "the rights of the bishop in the cathedral are those of bishop of the see." (1) If there had been any evidence of special powers vested in the metropolitan with reference to the cathedral, excluding or qualifying those of the bishop in the manner now put forward, it seems inconceivable that it should not have appeared in their answers upon such an occasion. It was said that the dean was in fact the ordinary of the cathedral, and therefore free from the control of the

(1) First Report of the Cathedral Commission, 1852, Answers from Deans and Chapters, p. 193.

bishop in the cathedral, but no authority was produced in support of that position, and considering that the cathedral, and the bishop, and the chapter, existed for nearly 200 years before the deanery was founded, there is probably none to be found, especially as until the passing of the Acts of 3 & 4 Vict. c. 113, s. 24, and 4 & 5 Vict. c. 39, s. 5, all former deans on their appointment took the oath of canonical obedience to the bishop, as did the canons on their institution to their prebendal stalls.

Upon the whole, therefore, I have not heard or been able to find any authority, nor do I know of any principle of ecclesiastical law which would enable the respondents to make important alterations in the Cathedral of Exeter without a faculty from the bishop of the diocese, and I am of opinion that any such alterations so made are contrary to the laws ecclesiastical.

The second question raised is, whether the placing and continuing on the reredos the images complained of is contrary to the laws ecclesiastical. There can, I think, be no doubt, as a matter of fact, that one of the great objects of those who promoted the reformation of the Church of England was to banish images from their churches: the evidence of this seems conclusive. In the time of Henry VIII., it is true, little was done to further it. The establishment of his own supremacy, and the confiscation of the property of the church, chiefly engaged his attention, and he thought much more of appropriating the lands than of purifying the doctrines of the Church of Rome. Indeed, he himself remained to the last more attached than opposed to any teaching of that Church which did not encroach upon his own supremacy.

It was in the time of Edward VI. that the Reformation in this respect really commenced, and throughout the whole of his reign all the authority of the Crown, and even of Parliament, was directed against the retention of images in churches. At first the prohibition as to images seems only to have extended to "such images as they know in any of their cures to be or have been so abused with pilgrimages, or offerings of anything made thereunto, or shall be hereafter censed unto," which were directed to be "forthwith taken down."—(See Injunctions of Edward VI., Cardwell, Documentary Annals, vol. i. p. 6, A.D. 1547.) It was soon found, however, that disputes arose as to what images had in fact been misused, or were likely to be so, and it was therefore determined to avoid such contention in future by ordering the removal of *all* images from churches. Accordingly, on the 21st of February, 1548, N.S., a proclamation was issued to that effect. This proclamation is important. It purports to be issued by the King, with the consent of the Protector and Council, and is signed by them. It is in these terms: "After our right hartye recommendation to your good Lordship; where now of late in the King's Majestie's visitation, amonge other godlye injunctions, commanded to be generally observed through all parts of this his highness' realm, one was set forthe for the taking downe of all suche images as had at any tyme ben abused with pilgrimages, offeringes, or censinges; albeit that this said injunction hathe in many parts of the realm ben well and quyetlye obeyed and executed, yet in many other places muche stryfe and contentyon hathe rysen, and daily ryseth, and more and more encreseth, about the execution of the same, some men being so superstytyous, or rather wylful, as they wold by theyr good wylles retayne all such images styll, although they have been moste manifestlye abused; and in some places also the images, which by the saide injunctions were taken

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downe, be now restored and set up againe, and almoste in every place ys contentyon for images, whether they have been abused or not: and whiles these men go about, on both sides, contentyouslye to obtain their myndes, contending whether this or that image hath been offered unto, kyssed, censed, or otherwyse abused, parties have in some places been taken in suche sorte as further inconvenyence is very like to ensue, yf remedy be not provided in tyme: considering, therefore, that almost in no places of this realm ys any sure quyetness, but where all images be hoolly taken away and pulled downe already . . ." It then directs the archbishop "that immediately upon the sight hereof, &c., you shall not onelye give ordre that all the images remaynynge in any churche or chapell within your diocese be removed and taken away, but also by your letters sygnyfye unto the reste of the bishoppes within your provynce his highnesse pleasure for the lyke order to be given by them and every of them within their several dioceses." (1)

The effect of this proclamation was (according to the opinion of the Judicial Committee in *Westerton* v. *Liddell* (2)) "to do away with the distinction between images which had been and images which had not been abused." It was followed the next year by the Act 3 & 4 Edw. 6, c. 10, which is intituled "An Act for the abolishing and putting away divers books and images," and the object of which was to enforce the observance of the new Prayer Book and of former orders with respect to images.

The Act is somewhat loosely drawn, but it cannot be doubted that it contains a statutable declaration of the illegality of retaining any images in churches, and that such was the meaning given it at the time appears by the wide terms as to images used by Bishop Ridley in the Visitation Articles and Injunctions issued by him in the following year (1 Cardwell, Documentary Annals, xxi., p. 92). The Judicial Committee in *Westerton* v. *Liddell* (3) point out that whilst there is a penalty for not destroying the books, &c., referred to in the statute, there is none for not destroying the images; but they add, "No doubt, however, it implies that to retain them is illegal, but it relates, in their Lordships' opinion, to the destruction of images already ordered to be removed, but which either had not been removed, or having been so, were still retained for private veneration and worship; and the images so described, for the reasons already assigned, cannot include crosses." In the opinion of the Privy Council, therefore, the enactment extended to images already ordered to be removed, and as all images had previously been so ordered to be removed, the statute included all images. This construction is fully borne out by the wide words of the statute itself, the words in the 2nd section being "any" images of stone, &c., whilst the exception in the 6th section as to "any image set up *or graven upon* any tomb," &c., "which hath not been commonly reputed and taken for a saint," seems to shew clearly the intended generality of the previous enactment.

This statute, which was repealed by Queen Mary, was revived by James I., and as to its prohibition of images, is law at the present day.

At the accession of Queen Mary the old superstitions were restored, and so continued during her reign, but when Elizabeth succeeded to the throne many of

(1) Cardwell, Documentary Annals, vol. i. p. 47.
(2) Special Report by Moore, p. 169. (3) Special Report by Moore, p. 171.

the statutes of Mary were repealed, the supremacy of the Crown was re-established by 1 Eliz. c. 1, and all such jurisdiction in spiritual matters as hitherto had been, or lawfully might be exercised by any spiritual or ecclesiastical authority, was annexed to the Crown of England, and power was given to the Queen and her successors to appoint commissioners for the purpose of exercising ecclesiastical jurisdiction. These powers Elizabeth exercised to carry out the prohibitions of Edward VI. as to images in churches. The advertisements and injunctions issued by her are similar to those published by her brother, the visitation articles of her bishops are quite in accordance with them, and whilst sternly repressing conventicles, prophesyings, and the like, she yet continued to enjoin the reading of the Homilies according to her Injunctions (Cardwell, Doc. Annals, vol. i. 431–435), and issued commissions, the execution of one of which appears from a letter to Peter Martyr from Bishop Sandys, dated the 6th of April, 1560, as follows:—"I was sent by command of the Queen into the northern parts of England as an inspector or visitor, as they called it, for the purpose of removing the abuses of the Church, and restoring to it those rights which are consistent with true religion and godliness." "*All images of every kind* were at our last visitation not only taken down, but also burnt, and that too by public authority." Other commissions were issued into the other dioceses. Of that sent to Exeter Bishop Jewell was a member, and according to Oliver's History of Exeter it was executed with quite as much rigour as that referred to by Bishop Sandys, nor is there any reason to doubt that the other commissions were carried out in the same spirit.

Queen Elizabeth's own private inclinations were, doubtless, somewhat opposed to her public acts, at least she had the crucifix in her private chapel, and only discontinued its use at intervals in consequence of the strong remonstrances of the bishops, but whilst her love of pomp and shew inclined her towards the picturesque and splendid ritual of Rome, she seems to have been determined that her subjects should abide rather by her public acts than her private practice, and her convictions of the feelings of the people must have been very strong to have induced her to sacrifice her own iron will to that of others.

A circumstance related in Strype's Annals of the Reformation, vol. i. pt. 1, p. 408, referred to by the learned counsel for the petitioner, well illustrates this. Dr. Sampson, Dean of Christ Church, Oxford, wishing to please the Queen, had got a Book of Common Prayer richly bound, with fine cuts and pictures, representing the stories and passions of the saints and martyrs, and placed them against the epistles and gospels, and put the book before her. The Queen, however, was much displeased, sent for her old book, and after the service went straight to the vestry and rated the dean soundly. He protested (as well he might) that he did not think it would have offended Her Majesty. But, said the Queen, "you must needs be ignorant then. Have you forgot our proclamation against images, pictures, and Romish relics in the churches? Was it not read in your deanery?" "It was read," said the dean. "But be your Majesty assured I meant no harm, when I caused the cuts to be bound with the service Book." "You must needs be very ignorant," repeated the Queen, "to do this after our prohibition of them." There seems no reason to think that during the whole of her reign the stringency of the laws against images in churches was at all relaxed.

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In the first year of the reign of James I. the statute of 3 & 4 Edw. 6, c. 10, was revived, and this revival is important, as parliament must be taken to have been aware of all that was done under it in the reign of Edward VI. as well as of all the Acts of Queen Elizabeth with respect to images in churches, without the assistance of that Act. The revival, therefore, of the 3 & 4 Edw. 6, seems to be a parliamentary sanction to all that had been done in the interval, and that James himself was under the impression that all images had been removed from the churches sufficiently appears from his remarks at the Hampton Court Conference, 1603, referred to in the judgment of Sir John Dodgson in the case of *Westerton* v. *Liddell*. (1) That images were reintroduced into some of the churches during the reign of Charles I. is not improbable. The opinions of Archbishop Laud as to their propriety were very decided; they are to be found set forth in a judgment pronounced by him when Bishop of London, during proceedings against Henry Sherfield, Recorder of Salisbury, in the Star Chamber, for breaking a stained glass window in a church in Salisbury, without the consent of the ordinary; the report of the case is in 3rd State Trials, p. 519. Whilst, however, Archbishop Laud was strongly of opinion that the law had been carried too far in excluding images from churches, I do not collect that he ever asserted or argued that they were not so excluded; indeed, I infer the contrary from his own remarkable account of the proceedings against him in Parliament, and his skilful defence of himself to the charges brought against him.

He certainly denied that pictures of saints on canvas or in stained glass windows were illegal by the statute of Edw. 6, or included within the advertisements or Homilies, but he nowhere suggests that images were not excluded by the law of the land from churches, 4 Vol. State Trials, p. 315, et seq.; accordingly, I do not find that during Charles's reign the law as to images was at all altered, but that, under the powerful protection of the archbishop, their partial use may have been revived with impunity is possible; if, however, they were so introduced to any extent, they were again swept away during the Commonwealth; nor do the Acts and proceedings subsequent to the Restoration appear to have revived them. The Act of Uniformity, embodying as it were the articles to which assent is still required from the clergy by 28 & 29 Vict. c. 122, seems to have continued to the present day the state of the law as to images in churches which had been established in the reign of Edward VI., no change having been made even during the reign of James II. That this is so seems to be placed beyond doubt by the recent and important cases of *Westerton* v. *Liddell* (1) and *Beal* v. *Liddell* (2), decided by the Judicial Committee of the Privy Council, and upon which it will be seen I have largely drawn in the foregoing sketch of the progress of the law upon this subject. In those cases a plain cross had been placed over the chancel screen in the church of St. Barnabas, and another fixed on the communion table of the church of St. Paul's, Knightsbridge, and the question was whether they were legal. Dr. Lushington, in the Consistory Court, held, that although the crosses in question were not "images," they were yet illegal as not being shewn to be ornaments in churches in the second year of Edward VI. Sir John Dodgson, in the Court of Arches, decided that the crosses were "images," and, therefore, clearly illegal; and the cases coming on appeal to the Judicial Committee of the Privy Council,

(1) Moore's Special Report, p. 123. (2) Moore's Special Report p. 169.

that tribunal held that the cross was not an "image," and even although it had been abused, yet when used merely as an architectural ornament, and not in the services of the church, it was not illegal. The whole train of reasoning in that remarkable judgment proceeded on the distinction between crosses and "images," and "although it is true that crosses had been abused as well as crucifixes and images of saints, it must be remembered that there is a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and crucifix:" Moore's Special Report, p. 162. All the arguments of counsel in that case were directed to establish the distinction referred to, and it is plain that the judgment proceeds upon it. No doubt in that case the Judicial Committee went very far in overruling the decision of both the Courts below, presided over as they then were, but they did so upon the intelligible distinction between plain crosses and images in churches, a distinction illustrated by the statute of James I., which in the case of a popish recusant found with a crucifix of value, directed it should be defaced and returned to him, that is, I apprehend, the image defaced, and the cross returned; but in allowing the plain wooden cross on the chancel screen of St. Barnabas the judgment proceeds:—"Their Lordships hope and believe that the laws in force respecting the consecration of any building for a church, and *which forbid any subsequent alteration without a faculty from the ordinary*, will be sufficient to prevent any abuse in this respect." (1) Indeed, the learned counsel for the respondents in the present case did not seriously argue that images in churches were not prohibited, but they contended that the figures complained of in the petition were not images within the meaning of the prohibition, and that even if each figure by itself were an image, yet being grouped with other figures into the sculptured representation of three historical scenes, they did not come within such prohibition.

The structure which occasions the present discussion is, as your Lordship is aware, of alabaster and marble at the east end of the chancel of the cathedral, and occupies, as already mentioned, about the space sufficient to serve as a back to the communion table, the spaces at either side being an open grating admitting a view of the Lady chapel behind. It consists of three compartments, the centre one being very much elevated above the others and rising to a point from which springs the pedestal of a very beautiful and highly ornamented cross, with two angels on pedestals, one on either side. Immediately below the arch of the compartment, and in a separate and richly ornamented frame, is the figure of the Saviour ascending, looking upwards with his hands extended sufficiently to exhibit the stigmata. It is in alto relievo, with a kneeling angel on each side in adoration. Below the frame is a group of smaller figures representing the Apostles in different attitudes of wonder and adoration. The lower compartment on the right contains the figures of the Apostles on the day of Pentecost with the tongues "like as of fire" on their heads, whilst the Holy Ghost, represented by the figure of a dove, hovers over them. That on the left represents the figure of our Lord as transfigured, with Moses and Elias on either hand, and the three Apostles in front. The marble post or column at each end of the reredos supports the figure of an angel on a pedestal. All the figures are small, the figure of the Saviour in the centre, which is considerably the largest, not being, I should judge, more than

(1) Moore's Special Report, p. 175.

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three feet high. The whole is elaborately and beautifully carved, and richly, indeed profusely, gemmed and ornamented with coloured marbles.

Now it was said that such figures are not images, because they are not quite separated from the structure, being in alto relievo. This architectural distinction, however, does not apply to the figures of the four angels, which are not in alto relievo, but which would properly be called statuettes—but is there really any distinction between them? the one exhibits the person intended to be represented as completely as the other, and that the circumstance of the one being fixed to the structure at the back, and the other at the feet, should make the difference between the legal and the illegal, seems difficult to comprehend, and that such representations come within the meaning and intention of the various prohibitions as to images, cannot, I think, be seriously doubted. What those framing such prohibitions wished to guard against, was what they considered to be *the peril* of idolatry, and they could scarcely have supposed that any one would offer worship to the figure if wholly detached, and withhold it from an alto relievo. The object of the reformers, whether right or wrong, seems to have been to put an end to all such questions by excluding *all* images from churches, and they appear to have used words sufficient for that purpose. As to the figure of the dove—the preliminary articles drawn up 1 Eliz., 1559, Cardwell, Documentary Annals, vol. i. 263–266, in terms disallow "the expressing the Holy Ghost in the form of a dove." But it is said further, that being in groups and representing historical scenes, the figures are not illegal. As a fact, it can scarcely be said that the figure of the ascending Saviour does form part of a group, nor the angels, nor the dove. But if a single image be unlawful, can it become less so by adding others to it? The most touching group the world ever saw was the dying Saviour, with his mother on one side and the beloved disciple on the other, at the foot of his cross; yet that group formed the Rood, and was for obvious reasons the most emphatically denounced. But when nice questions are raised as to the meaning of laws framed long ago, surely the proper guide to have recourse to, is to see what was said, and what was done, and what was recognized at the time, and what has been the usage since. It was admitted in this case that, at all events, the denunciations contained in the second part of the Homily against "the peril of idolatry" would include the present images. Now, without attributing to the Homilies the authority which is sometimes claimed for them, as being of statutory force, yet, as a contemporaneous exposition of what was said and understood to be the law at the time, they are of the greatest possible weight. They were frequently enjoined to be read to the people by Queen Elizabeth and her bishops. The 35th Article of the Church, which is said by Dr. Burn to be part of the statute law, states them to contain "a godly and wholesome doctrine, and therefore we judge them to be read in churches by the ministers, diligently and distinctly, that they may be understanded of the people." The rubric, which is part of the Statute Law, directs them to be read except there be a sermon, and the 80th canon directs them to be provided by the churchwardens of every parish, at the expense of such parish. It is true, the custom to read the Homilies has ceased in our day, and it may be correct to say that there is much in the Homilies not so applicable to the present times as to those in which they were composed, and their reading enjoined; but that in nowise affects the weight to be attributed to them as a contemporaneous exposition of what the law was understood to be in former times; and when we look to what was done

under the laws with respect to images, we find it quite in accordance with the Homily, whilst an almost unbroken usage of three hundred years has unmistakeably confirmed that understanding of the law. It was said that in many cathedrals and other churches, images of a similar character to those petitioned against are to be found, and photographic representations of several were produced; in all those cases, however, the figures had been recently erected, and such instances cannot change, though they may violate, the law. Whether it be right that images should again be placed in our churches—whether it is at all probable that if so placed they would become the subjects of veneration or idolatry—whether churches can or cannot be rendered sufficiently beautiful without their re-introduction, are all questions upon which it is beyond my province to give any opinion whatever; the simple question is, are they at present allowed by the laws ecclesiastical? Now, no case or authority whatever was referred to shewing that the law as to images has been at all altered. One case was mentioned by the petitioner's counsel, in which a faculty was granted by the Consistory Court of Exeter, for the removal of a Calvary, as it was called, consisting of an image of our Saviour on the Cross, with the Virgin and St. John, at either side, fixed to a reredos erected in the parish church of Lynton, from which there was no appeal, and it was admitted by counsel for the respondents, that such a group could not be supported. In argument it was asked whether it was intended to render illegal all figures of living things of every kind, which are still to be found in any part of the Cathedral of Exeter, and which had escaped the hand, possibly the observation, of the spoiler, in times past. It is not necessary, however, to anticipate questions which may never be raised; but if raised, I should suppose that figures, or portions of figures, sometimes grotesque, sometimes serious, upon a boss, or a corbel, or interwoven with the tracery of a pattern over a door, or on a gallery, and all of an ancient date, might probably receive a different consideration from the question as to the legality of images of our Saviour and of his Apostles, placed over the holy table in a position used in Romish times for the purpose of honour to the altar of sacrifice supposed to exist there. This is the question which unfortunately has been raised on the present occasion, and which, having been raised, it is incumbent upon your Lordship to decide. I may notice that the counsel for the petitioner objected that the reredos might be considered an ornament to a Romish altar, and so illegal, upon the authority of a case known as the *Baldacchino Case.* (1) This point, however, I understood not to be pressed or much argued, nor does it appear to be within the scope of the petition with sufficient certainty; I, therefore, have not considered it, nor am I prepared to offer any opinion upon the point.

I feel bound to advise your Lordship that, in my opinion, the petitioner has substantially sustained the allegations in his petition, that the reredos, under the circumstances of its erection without a faculty, has been erected contrary to the laws ecclesiastical, and that the images upon it are also illegal, as contrary to those laws.

The Bishop of Exeter then proceeded to pronounce judgment in the following terms:—

Having now read the opinion of my learned assessor in which the law affecting

(1) *White* v. *Bowron*, Law Rep. 4 A. & E. 207.

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the questions before me is so ably and so clearly stated, it remains only for me to say that I assent to and adopt that opinion, and to pronounce judgment in conformity therewith:

Accordingly, I, as visitor and ordinary, do declare and adjudge that the removal of the stone screen which recently formed the east end of the choir of this our cathedral church, with the Ten Commandments thereupon, and the setting up of a reredos with certain images thereon, in substitution of the said screen, so removed by the dean and canons, being the respondents herein, without any faculty or other lawful authority, was illegal as contrary to the laws ecclesiastical. And I do further declare and adjudge that the images upon the said reredos so set up, and the placing and continuing of the same by the respondents upon the said reredos, are and is illegal as contrary to the laws ecclesiastical. And I do order and adjudge that the said reredos and the images thereon be removed, and that either a stone screen without images thereon, be erected, or the open ironwork lately erected and now standing on each side of the said reredos, be continued, so as to occupy its place. And I do further order and adjudge that the Ten Commandments be set up on the east end of the choir of our said cathedral, in compliance with the terms of the canon (1), where the people may best see and read the same.

Having now, in accordance with the advice of my learned assessor, pronounced a formal judgment so as to found a right of appeal if any of the parties should be so advised, I think it right to add that I shall be quite ready to entertain an application for a faculty to vary the above order and to make such arrangements as, without involving anything illegal, would contribute to the architectural beauty of the cathedral, and I may observe that the position of the petitioner as chancellor will offer no obstacle, as I should myself hear the application according to the reservation contained in his patent.

I may state that if there is no appeal, it will be competent for the petitioner, if the reredos be not removed, or a faculty granted, to apply to me within a reasonable time for a monition to enforce the order, giving of course, the usual notice. (2)

From this judgment, both in so far as it purported to be an exercise of jurisdiction and in so far as it declared the reredos and the sculptures thereon to be unlawful and ordered the Ten Commandments to be erected over the communion table, the dean and chapter of Exeter appealed to this Court, and the Judge of the Arches Court issued an inhibition with a citation authorizing and enjoining the Bishop of Exeter to cite the Venerable William John Phillpotts to enter an appearance in the appeal. In obedience to this citation, the Venerable William John Phillpotts appeared, but under protest, and his proctor filed a petition on protest, alleging

(1) Canon 82.

(2) In reply to the petitioner's counsel the bishop stated that the order was upon the respondents, and that the monition would issue to them to comply with it.

that "the Court of Arches and the official principal thereof had no jurisdiction to entertain the appeal, inasmuch as it was made from a judgment of a decree made by the visitor of the cathedral church of Exeter, at a visitation of such cathedral church, and that the appeal from such judgment did not lie to the Arches Court of Canterbury, or to the official principal thereof."

Further pleadings on protest were gone into, and on the 3rd of July the question of jurisdiction raised on the pleadings under protest came on to be argued before this Court.

W. F. Phillpotts appeared for the respondent under protest, and prayed the Court to pronounce for the protest and dismiss the appeal with costs. The appeal in this case cannot lie to the Arches Court of Canterbury. The Judge of the Arches Court is the official principal of the archbishop, and can only discharge the duties appertaining to an official principal. The proper work of an official principal is said to be to hear causes between party and party (1 Phillimore's Eccl. Law, 1208). The authority possessed by an official principal does not extend to the exercise and administration of the jurisdiction vested in a bishop as visitor. In such matters the jurisdiction of the bishop must be exercised either by himself in person or by a commissary especially appointed by him for the purpose, or, as is ordinarily the case, by his vicar-general: Gibson's Codex, Introduction, p. xxiii.; Phillimore's Eccl. Law, p. 1208. And further, if the decision of either the bishop, his commissary, or his vicar-general is complained of, the appeal can only be carried, in the province of Canterbury, to the Archbishop of Canterbury in person, or to a commissary especially appointed by the archbishop to hear the appeal, or to the vicar-general of the archbishop. The metropolitan has in effect, in the present case, an appellate jurisdiction analogous to the jurisdiction he undoubtedly possesses to visit in person any of the bishoprics in his province sede vacante: Gibson's Codex, Appendix, p. 1333. On the other hand, no precedent can be found which shews conclusively that the official principal of the archbishop ever possessed or exercised the jurisdiction to take cognizance of an appeal in a case like the present; and on this point, indeed, *Goodman's*

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Case (1) is an authority in favour of the respondent. *Havers' Case* (2) will be relied on in support of the jurisdiction of this Court, but that case is not in point, for apart from the fact that evidence was taken as before a court of first instance, it must be assumed that the Judge of the Arches at that time was also the vicar-general of the province, and consequently the case might, consistently with the facts reported, have been entertained by him in the latter capacity. These considerations would also apply to other cases which might otherwise seem to be of authority on the point, for it is only in recent times that the offices of Judge of the Arches and vicar-general to the archbishop have been held separately.

Dr. Deane, Q.C., and *W. G. F. Phillimore*, for the appellants:—

In this case, where the grievance appealed from is an act done by the Bishop of Exeter as visitor jure ordinario of the cathedral church of his diocese, the appeal does not lie to the Archbishop of Canterbury, but to the Archbishop in the Arches Court of Canterbury; and the Judge of the Arches, by authority delegated to him from the archbishop, has full jurisdiction to take cognizance of it and decide it. In a return made to the House of Commons in 1868 of "all causes of discipline decided by the High Court of Delegates" (3), several instances occur where appeals have been prosecuted from the decisions of bishops of the province of Canterbury "in matters of visitation," and it appears that in every such instance the appellants appealed to the Judge of the Arches, sitting in the Court of Arches, before the cases were carried to the High Court of Delegates. Thus, *Havers' Case*, numbered 69 in the return, is not to be distinguished from the present case. Other analogous cases are numbered 15, 102, 116, 117, 134, 135, and 160; and in none of these precedents is anything stated which can rightly lead to the conclusion that the appeals properly lay to the vicar-general of the archbishop. Apart, however, from precedent, it can clearly be

(1) Dyer, 273.

(2) Return of appeals before the High Court of Delegates, p. 31, No. 69 (Parliamentary Papers, 199, April 3, 1868).

(3) Parliamentary Papers, 199, April 3, 1868.

shewn that the appellants have pursued the proper course in appealing to the Judge of the Arches Court, and not to the vicar-general of the archbishop. It is said indeed on behalf of the respondent, that the appeal lies to the archbishop in person; but it is also admitted that he may delegate power to determine it to some commissary appointed by him for that purpose. Now, in the patent granted to the Judge of the Arches a delegated authority is given to entertain not only the appeals over which the official principal of the archbishop would have jurisdiction, but also "all other appeals whatsoever interposed to the audience of us and the jurisdiction of Christ Church, in Canterbury": 1 Phillimore's Eccl. Law, p. 1205. It is clear, therefore, that under the provisions of this patent an appeal like the present must be included; and that being so, it is unnecessary to consider whether, if the Court of Audience of Canterbury existed at the present day, the appeal would not have been to that Court. With respect to *Goodman's Case* (1), it is probably wrongly reported; but, at all events, it was decided in very unsettled times, and can scarcely be considered a precedent either way. If an act done by a bishop at an episcopal visitation is, as there is authority for holding, an act done by him judicially in court—in a court of visitation—surely an appeal must lie from that Court, just as from other Courts of the diocese—to the Court of the Metropolitan, i.e. to the Arches Court of Canterbury.

Phillpotts, in reply.

July 3. SIR ROBERT PHILLIMORE. This is an appeal from a judgment of the Bishop of Exeter. It is admitted by the counsel for the respondent that an appeal does lie to some jurisdiction from the judgment in this case. It is suggested, first, that it lies to the archbishop in person; secondly, that the bishop's visitation in this matter is of the same kind, and not to be distinguished in point of law from the general visitation of his diocese; that he is visitor as ordinary, and not by any special statute of the founder.

The objections which have been taken under protest, and supported by the able argument of Mr. Phillpotts, against the jurisdiction of this Court, appear to be the following:—First, that this is a personal act of the bishop, and to be distinguished from an

(1) Dyer, 273.

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act which would be done in his consistory; secondly, that that being the case, the appeal lies to the archbishop personally; and thirdly, that the Dean of Arches being only official principal, and not vicar-general, the appeal in a case of this kind, even though it would lie to a vicar-general, cannot be heard by an official principal. And here I may observe that there is a good deal of confusion arising from books which contain legal treatises on the jurisdiction of the bishop in his court. The word "ordinary," it is not sufficiently remembered perhaps, as used in the statute (1) applies either to the bishop, acting personally, or to the bishop acting through the medium of his own officers in his consistory. It is very necessary to bear this in mind, because it clears up a great many apparently confused and contradictory opinions, which are to be found in the books on this subject. The truth is, when the ordinary is spoken of, he is spoken of either with relation to what he can do in his personal capacity of bishop, or what he can do, according to law, through the medium of his chancellor. Therefore, I should be of opinion that the fact of an act having been done by the bishop out of his court, as it might be, for instance, on his triennial visitation, would not debar the subject from the right of appeal to the metropolitan, which he has, from all acts done by his bishop; and I am of opinion, also, that to appeal to the metropolitan, means to appeal to the Metropolitan's Court, unless indeed in the patent which is given to the Dean of the Arches, who fills the office of official principal to the Archbishop of Canterbury, the powers which are to be exercised on the appeal are specially exempted. If, therefore, there be an appeal to some jurisdiction in this case, and if there be no distinction between an act done by the bishop in his ordinary visitation of his diocese, and in his visitation of the cathedral, I should be of opinion, apart from all precedent, that on the general and well-established principle of ecclesiastical law and common law, an appeal would lie from the Bishop of Exeter, as ordinary, in his visitation, to the archbishop, or the Archbishop's Court, unless, as I said before, there are some words in the patent of the official principal of the Arches Court which exempt this jurisdiction from his authority.

(1) See 1 Hen. 7, c. 4, now repealed.

Now the words of my patent, necessary to be referred to, are as follows: I am to "receive, in due form of law, all and every the appeals interposed or to be interposed to our Arches Court of Canterbury, and all and every the complaints by law and custom devolved or to be devolved to the said Court, and also to take cognizance of and proceed in all and every such causes or businesses of appeal and complaint, and in all and singular the causes and businesses whatsoever, now depending undecided, or hereafter to be brought and examined in our said Court; and to do, exercise, and administer plenary justice, according to the exigency of the law, and to the statutes of this kingdom of Great Britain, to all and singular the parties in the said suits, now or hereafter to be controverted; and also receive in due form of law, all and singular the appeals interposed or to be interposed from our Dean of the Arches, or his surrogate, deputy, or commissary"—that implies that the Dean of the Arches was in early days separated from the official principal—"and from all others whomsoever, interposed to the audience of us, and our jurisdiction of our Church of Christ, Canterbury; and finally to determine the said causes of appeal according to law, and the custom of the said Arches Court, anciently used."

Now I should be of opinion that those words, taken in the true construction, give ample power to this Court to receive, on appeal, any case which might be brought before the archbishop personally.

These observations I have made without any reference to precedents, but it is necessary, before the Court closes its observations, that some attention should be given to the precedents which have been cited. And those are of a two-fold character—precedents of appeals from the acts of the bishop, as visitor, to the Court of Arches and subsequently to the Court of Delegates; and precedents of appeals from the sentence of the metropolitan to the Court of Delegates; both seeming to me to establish the same proposition, namely, that there is a regular course of appeal in matters like the present, through the usual stages of the ecclesiastical law; namely, from the ordinary to the metropolitan, whether through his court or personally, and from the metropolitan to the commissioners appointed by the Crown, or the Delegates,

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the duties of which are now discharged by the Judicial Committee of the Privy Council.

The precedents seem to be, perhaps with one exception, very much to the point. They all, I should observe, are to be found in a valuable document, a return to an address of the House of Commons, dated the 5th of July, 1865, by the present learned Registrar of the Appeals, who is also Registrar of the Court of Admiralty. It is a "Return of all appeals in causes of doctrine or discipline made to the High Court of Delegates, from its erection by the 25 Hen. 8, c. 19, A.D. 1533, until its abolition by the 2 & 3 Wm. 4, c. 92, A.D. 1832; specifying—1. The date of the cause. 2. The names and descriptions of the parties. 3. The court appealed from. 4. The nature of the cause. 5. The names and descriptions of the delegates, or con-delegates, distinguishing whether appointed 'under the great seal or half seal.' 6. The nature of the sentence, or whether the cause was otherwise settled or abandoned. 7. The date of the sentence." (1) And I have never heard it suggested that this document might not be safely relied upon without reading the voluminous documents from which the legal conclusion is drawn.

The first case, most material to notice, is numbered 15, and that took place in the years 1610 and 1611; it was between a clerk of the name of Robert Withers, of the diocese of Exeter, who appealed against certain canons residentiary, and against the Bishop of Exeter. The case was this: Withers was deprived of his office of vicar choral. There was an appeal to the Arches and an appeal to the Delegates, and no question was raised as to that being the regular course of proceeding, or as to the jurisdiction of the Court of Arches.

The next one, I think, was numbered 69, and was one which has been a great deal discussed, both on this and on a former occasion. The case of *Philip Havers, Clerk*, v. *The Bishop of London* (2) was in 1678 and 1679. It was a case of criminal correction of a clerk for having procured another person to be ordained for him; for having, in fact, consented to the forgery of his name in the letters of institution: and was an appeal from the

(1) Parliamentary Papers, 199, April 3, 1868.
(2) *Dean of York's Case*, 2 Q. B. 1.

court held by the Bishop of London during his triennial visitation at Colchester. There was a decree of the Court of Arches; it was affirmed, and went to the Delegates; and with those Delegates sat no less than one justice of the King's Bench, one justice of the Common Pleas, a baron of the Exchequer, with five civilians and three bishops, a very full Court of Delegates indeed; and they affirmed the decree of the Court of Arches, retained the cause, with the consent of the respondent, and condemned Havers in costs.

I am unable to follow the argument of the learned counsel for the respondent, by which he has sought to impair the stringency of these precedents, because it is well known to us—to those who have practised in the ecclesiastical courts—that it was competent for the superior Court, if it pleased, to admit fresh evidence, though that was rarely done, and not done without strong cause for such necessity being shewn. In this case, what appears to have happened was, that the bishop ordered the clerk to do a certain act, namely, to write a form of subscription, in order that he might compare it with the alleged forgery before him. The clerk refused to do so, and he was suspended, I presume either because the bishop thought that that was sufficient proof of his having committed the forgery, or for contempt of the order of the Court, it does not appear which. The appeal was by the clerk, and the Court of Arches took evidence as to the entries in the book of subscriptions; that is to say, it thought itself warranted, in the peculiar circumstances of that very remarkable case, to do that which it rarely does, namely, to admit fresh evidence, and the result was that it considered the offence proved, and Havers was sentenced to salutary penance, which sentence was affirmed by the Delegates.

Number 102 was an appeal in the year 1696, in which the vicar of the parish appealed. It was concerning the case of a correction of a clerk for immorality, and was appealed from the consistory of Hereford; and this case is perhaps open to a remark made by Mr. Phillpotts, that that appeal would be in the ordinary course, and could hardly be considered a precedent for the present suit; and I am inclined to think that objection is well founded.

Then there is another precedent, I think;—it is not necessary

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to go into them all. There is one, No. 160, which is one of a more recent date—as late as 1740—in which the Rev. Dr. Wynn, one of the canons residentiary of the cathedral church of Salisbury, appealed. The complaint was against the canon residentiary, and the case was a very remarkable one. It was "a business of complaint against a canon residentiary for alleged violation of cathedral statutes in dealing with the capitular revenues." That was also an appeal from a consistorial court, namely, that of Salisbury, and was an appeal that went up to the Arches, and then up to the Delegates. That case seems rather to illustrate what I said in the beginning of my remarks, that the bishop sitting in his court and the bishop sitting personally must be considered, so far as the question of appeal is concerned, as the same. This case, No. 160, also, as I have mentioned, went up to the Delegates. There are one or two more that were mentioned to me—134, I think, and 135—but they all go to the same point, namely, to shew that in cases of this description there has been an appeal to the Court of Arches.

The precedent that was most relied upon, as counterbalancing these rather strong authorities, was the case of Goodman, which is not unfamiliar to me, because I remember it was a case which, many years ago, I had the honour of quoting in argument before the Court of Queen's Bench, in a case of prohibition, concerning the canonical punishment of the Dean of York. (1) The case of Goodman was one that was chiefly relied upon, and though it was very much pressed in the argument, in the learned and elaborate judgment which was afterwards delivered, in granting the prohibition, no reference whatever was made to it, and it was well understood by the profession that the Court of Queen's Bench were of opinion that it was not a case so reported as to enable the Court to take any cognizance of it at all, and for that reason, I suppose, no notice was taken of it in the very carefully drawn judgment, in which every other case that bore upon the subject was referred to.

I am of opinion that, both on principle and on precedent, as well as on the words of my patent, that I must overrule this

(1) *Dean of York's Case*, 2 Q. B. 1.

protest, pronounce for the jurisdiction of the Court, and assign Mr. Phillpotts' client to appear absolutely in this case.

An absolute appearance having been entered on behalf of the Venerable William John Phillpotts as respondent, the proctor for the dean and chapter, the appellants, brought in a libel of appeal. This libel stated the proceedings before the bishop, and alleged that the bishop did unduly and unjustly overrule the protest to his jurisdiction, and did unjustly pronounce judgment in favour of the respondent. Notice of objection was filed to the admission of this libel of appeal.

On the 17th of July *Phillpotts*, on behalf of the respondent, moved the Court to reject the libel of appeal on the ground that from the facts alleged in the libel it appeared that the bishop did properly overrule the protest, and that the libel was inconsistent on its face, and bad in law. He cited *Dennison* v. *Ditcher* (Privy Council, 27th Nov., 1856). (1)

Dr. Deane, Q.C., and *W. G. F. Phillimore*, on behalf of the appellants, opposed the motion.

SIR ROBERT PHILLIMORE. I do not think I should be justified in deciding the question of jurisdiction on a motion to reject the libel of appeal. By so doing I should be disturbing the ordinary practice of the Court. There is a peculiarity in a libel of appeal; it is in this Court only a vehicle to bring up the process. It does not therefore come under exactly the same considerations as other pleadings in the Ecclesiastical Courts. The general rule of practice undoubtedly is that, except where there are special circumstances, the Court will not consider an objection to the libel of appeal to be rightly taken. I am of opinion that I must admit the libel. I shall order the costs of this motion to be costs in the cause.

A negative issue was subsequently given to the libel of appeal.

July 23. The appeal came on to be heard. The hearing was continued on the 24th and 25th of July.

Dr. Deane, Q.C., and *W. G. F. Phillimore*, for the dean and

(1) Not reported on this point.

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chapter of Exeter. There are two important questions presented to the Court for its decision in this case; first, as to the jurisdiction of the Bishop of Exeter, as ordinary and visitor of the cathedral, to make the order appealed from; secondly, as to the legality of the reredos and the images thereon. First, with regard to the question of jurisdiction. It is not contended, and not necessary to contend, that the Bishop of Exeter has not power jure ordinario to visit the cathedral and the dean and chapter of Exeter: Phillimore's Eccl. Law, p. 1332; Stephen's Laws of the Clergy, 1379. No doubt it is an historical fact that visitations of the dean and chapter of Exeter have been from time to time held by former bishops of Exeter, and that after inquiry at such visitations, orders have been made even with regard to the fabric of the cathedral. No instance, however, has been found where any order so made has been carried out without the assent of the dean and chapter. The attempt of the present Bishop of Exeter to proceed beyond inquiry in a matter relating to the body and fabric of the cathedral is, therefore, without precedent. It is also an excess of jurisdiction, and inconsistent with any power or authority which could rightly be claimed by him either as visitor or ordinary. The visitatorial power possessed by a bishop jure ordinario over his cathedral is in fact analogous to the jurisdiction exercised by an archdeacon as visitor of the parish churches within his archdeaconry. It has never been contended that an archdeacon could himself enforce compliance with an order to pull down an illegal erection in any of the parish churches visited by him. It would be necessary for him to resort to some court having jurisdiction over the matter. So in this case the bishop, having satisfied himself in his visitation that a structure which he considered illegal had been erected in the cathedral, ought to have resorted to the proper court to procure its removal, that is, to the court of the archbishop. The Diocesan Court of Exeter has no jurisdiction at all over the cathedral of Exeter. The learned judge who acted as assessor was of opinion that the fact of the deanery of Exeter having been founded by the Bishop of Exeter (*Reg.* v. *The President and Chapter of Exeter* (1),) was a reason for the dean and chapter being subject to the

(1) 12 A. & E. 512.

jurisdiction of the bishop; but this is not the case, for the dean has a peculiar exempt from the jurisdiction of the bishop and his officers: *Johnson* v. *Ley.* (1) And such peculiar consists of a parish in Devonshire, and the close of the cathedral church of St. Peter in Exeter: *Parham* v. *Templar* (2); and has not been affected by recent legislation: Schemes of the Ecclesiastical Commissioners, vol. vi. 135; Report of the Ecclesiastical Commission, 1832, Appendix, p. 583. Indeed, so late as 1827 a case of brawling in the cathedral was tried in the peculiar court of the dean, before a surrogate of the dean: *Risdon* v. *Baron.* (3) From the peculiar court of the dean the course of the appeal is clearly not to the consistory of the bishop—a co-ordinate jurisdiction—but directly to a superior jurisdiction, that is, to the Court of Arches: *Philips* v. *Bury* (4); Phillimore's Eccl. Law, p. 1203; Stephen's Laws of the Clergy, p. 29; *Parham* v. *Templar* (2); Ayliffe's Parergon, pp. 417, 418. It is, moreover, on record that a metropolitan visitation of the cathedral has taken place: Heylyn's Life of Laud, pp. 269, 271; Historical MSS. Commissioners' 4th Report, 1874, p. 137. It is not denied that the bishop as ordinary might have power to visit the dean and chapter for their personal correction: Phillimore's Eccl. Law, p. 204; and with reference to the statutes of the cathedral: Phillimore's Eccl. Law, p. 2012; but it is submitted that even at a visitation for such purposes the bishop, having delegated his visitatorial power to his vicar-general (Ayliffe, p. 509), has no jurisdiction to sit himself, and ought either to proceed by his vicar-general or by a commissary specially appointed for the occasion. [They referred to *Ex parte Medwin.* (5)] Even if the bishop had power to visit in his own person he could only so visit at his triennial visitation: Phillimore's Eccl. Law, pp. 1344, 1345; at any other time he must conduct his visitation by means of his vicar-general or a commissary: *Philips* v. *Bury.* (4) Moreover, even assuming the visitatorial power to be primarily in the ordinary and exercisable by his vicar-general, in the present case the respondent being himself vicar-general of the diocese

(1) Skinner, 589.
(2) 3 Phill. 223.
(3) Not reported.
(4) 2 T. R. 346, 348.
(5) 1 El. & Bl. 609.

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of Exeter, the suit should have begun in the Arches Court under the excepted case in the Statute of Citations.

It was contended in the Court below that a faculty ought in any event to have been obtained before the reredos had been erected, and, consequently, that a discretion vested in the bishop, under which he might order its removal irrespective of its illegality. This proposition is untenable. Not only can it be shewn that no sanction of the bishop as bishop has ever been obtained to the various alterations which have from time to time taken place in the Cathedral of Exeter, but in fact no machinery exists, or ever existed, for obtaining that sanction, either through the medium of the Court of the chancellor of the diocese or otherwise. It has, moreover, been ascertained that no trace of any faculty for alterations in a cathedral, which was not also in use as a parish church, can be found in any diocese throughout England. This in such a matter is conclusive. It is true that the cathedral church has been called the parish church of the diocese, but can it reasonably be contended that all the inhabitants of any diocese must be cited before any alterations can be made in the cathedral church of the diocese? In the cathedral church of Exeter, the dean and chapter have always directed such alterations as they thought fit. Thus, for example, in 1823, the reredos, which before that date stood at the east end of the choir of the cathedral, was removed by the sole authority of the dean and chapter.

If the Court should be of opinion that the bishop has not exceeded his jurisdiction, the further question whether he has rightly decided on the merits of the case remains to be determined.

The images ordered to be removed are groups of sculptured figures, illustrating passages of scripture, and therefore not open to the same objection as the image on the reredos in the *Lynton Case* (1), which was in fact a crucifix or rood, and might therefore be illegal under the decision of the Privy Council in the case of *Westerton* v. *Liddell.* (2) The images or sculpture upon the reredos in the present case are not made illegal either by the statutes, injunctions, or usages of the Church of England. It may well be that some images are unlawful, but does it therefore follow that all

(1) Not reported.

(2) Moore's Special Report.

images in churches are unlawful? Again, in what does the unlawfulness of an image consist? In its position at the east end of the church? in its being carved out of, or standing separate from, the walls or roof? There is no doubt that formerly all images in glass windows were destroyed, but yet at the present time the use of images in glass windows is universal, and no objection would be taken to the groups of figures forming the reredos in this case if only, instead of being sculptured in stone, they had been painted on glass. Why should not the same consideration which has led to the use of painted windows in churches of the Church of England (*Pierson* v. *Gell* (1), *Pricket's Case* (2), *Sherfield's Case* (3)) apply equally in favour of groups of sculptured figures illustrating passages of scripture? Figures sculptured in stone are no more likely to become objects of superstitious reverence than figures painted on glass.

The Church of England allows the use but disallows the abuse of images. The true proposition of law is, in fact, that an image is not unlawful unless it is an image which, according to the ecclesiastical law of England, would be liable to abuse, that is to say, an image which could be decked, kissed, carried about, or worshipped.

The injunctions and other documents of Edward VI. and Elizabeth can be shewn to have been directed against such like images, and no others. (4) Moreover, the Act of Parliament 3 & 4 Edw. 6, c. 10, and the injunctions and other documents relied on as proving that the images upon the reredos are illegal, were meant to apply to such images as are referred to in Lyndwood's Provinciale, p. 253, that is to say, ornaments of the church (see Phillimore's Eccl. Law, pp. 929, 931). The sculptures on the reredos are architectural decorations. Such decorations are in nowise illegal: *Westerton* v. *Liddell.* (5) The position of the reredos cannot render images unlawful which would otherwise be lawful, for no

(1) Return of Causes before the Delegates, p. 85, No. 171.

(2) Cited in *Frances* v. *Ley*, Cro. Jac. 367.

(3) 3 State Trials, 519.

(4) The learned counsel reviewed the historical documents material to the question, but the course of their argument on this point can be gathered from the judgment; the limits of this report will not allow of the argument being stated here at length.

(5) Moore's Special Report, 161.

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one part of the cathedral is more sacred than the other part. The Homily against the Peril of Idolatry has been strongly relied on as proving that the reredos and the images thereon are contrary to ecclesiastical law; but the Homilies are not binding in law, and have no legal force. The expression used in them must be regarded as having reference to the practices of the times when they were written: *Heath* v. *Burder* (1); *The Queen's Procurator* v. *Stone.* (2) So much of the statute of 3 & 4 Edw. 6, c. 10, as refers to images only applied to "false and feigned" images which, at the time of the framing of the statute, remained in any church or chapel of the Church of England, and the effect of the statute was only temporary, and its provisions can have no application to anything erected in churches in recent times. In 1684, the then Dean of the Arches (Sir Richard Lloyd) decided in the case of *Cocke* v. *Tallents* (3) that a faculty (to use the language of the sentence in the case) "pro meliori ornamento ecclesiæ de Moulton videlicet pro dealbatione et pictione ecclesiæ de Moulton prædictæ et erectione effigierum apostolorum in eâdem" had rightly and legally been granted by the surrogate of the chancellor of the diocese of Lincoln in the first instance, but subsequently wrongly revoked by the chancellor of the diocese sitting in person.

As to so much of the bishop's order which orders the removal of the reredos itself, and the placing the commandments at the east end of the choir of the cathedral, it is submitted that the opinion of the learned assessor finds that the dean and canons intend to obey the law. [They referred to *Liddell* v. *Beal.* (4)]

W. F. Phillpotts, for the respondent. The Bishop of Exeter has jurisdiction, jure ordinario, over the fabric of the cathedral; his jurisdiction in that respect has been acquiesced in on many occasions, and it is now too late to question its existence. It was virtually decided in *Dean of York's Case* (5), that a bishop

(1) 15 Moore, P. C. 1.

(2) 1 Hagg. Cons. 424.

(3) Not reported; but see "A breviate of the case concerning setting up images in the parish church of St. Moulton," printed as one of "Several miscellaneous and weighty Cases of Conscience learnedly and judiciously resolved by the Right Reverend Father in God, Dr. Thomas Barlow, late Lord Bishop of Lincoln," edited London, 1692, 8vo.

(4) 14 Moo. P. C. 1, 15.

(5) 2 Q. B. 1.

acting as visitor had all the judicial powers of an ecclesiastical court, except in cases where those powers were curtailed by the provisions of the Church Discipline Act (3 & 4 Vict. c. 86). In this case there is no pretence that the proceedings are within the Church Discipline Act. The order appealed from could therefore rightly be made by the bishop. [He referred to *Fagg* v. *Lee.* (1)]

In *Dean of York's Case* (2), at the commencement of the proceedings the bishop sat in person, and that at a special and not a triennial visitation. At the visitations of Exeter Cathedral held by Bishop Lamplough, A.D. 1679, and Seth Ward, A.D. 1662, articles were administered to the dean and chapter as to the fabric of the cathedral, and were answered by them. Is it not reasonable to assume that if these bishops possessed power to compel answers to such articles they could go further, and on the discovery of any illegal act enforce compliance with the law? The bishop is the incumbent of the cathedral, and has the same power over the cathedral as he would have over a parish church of his diocese: Phillimore's Eccl. Law, p. 1799; *Re The Pews of the Cathedral of St. Columb, Londonderry.* (3) It has been said that the visitatorial power of the bishop is a power of inquiry only, but this is not so; for every visitation is for "repression, correction, and reformation." Assuming, however, that the dean has a peculiar, the jurisdiction possessed by him within the limits of his peculiar could only be exercised concurrently with the bishop. [He referred to *Daniel Appleford's Case* (4); *Johnson* v. *Ley.* (5)]

The case of *Parham* v. *Templar* (6) is not material to the present case. The bishop's jurisdiction over the cathedral was not then in question, and it was admitted that the Bishop of Exeter had never visited in the parish which was there decided to be the peculiar of the dean and chapter of Exeter. The case of brawling in the cathedral referred to proves nothing, for no appeal was prosecuted. Although it is customary for bishops to delegate the power of visitation to their vicars-general, yet it has been always held that they might reserve to themselves the power of visiting and hearing causes on special occasions: *Dean of York's*

(1) Ante, p. 135.
(2) 2 Q. B. 1.
(3) 8 L. T. (N. S) 861.
(4) 1 Mod. 82.
(5) Skinner, 589.
(6) 3 Phillim. Eccl. 223.

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Case (1); *The Bishop of St. David's* v. *Lucy.* (2) The visitation of the dean and chapter and the cathedral sede vacante is in the metropolitan: Gibson's Codex Appendix, 1333. From this alone it might well be argued that the power of visitation at other times belongs to the bishop of the see.

It is illegal to place images such as those upon the reredos in a church or cathedral of the Church of England; but, even assuming the contrary, the bishop had a discretion as to what erections or alterations should be allowed in his cathedral church, and he has rightly exercised his discretion in this case. The reredos and the images thereon come within the class of images objected to in the Homilies as leading to the peril of idolatry. The reredos must be considered to have been placed in the cathedral as an aid to worship, but all such adventitious aids to devotion are admittedly not necessary, and indeed are forbidden by the formularies of the Church. The same tendency to give veneration to that which ought not to be honoured as was existing at the period of the Reformation, and gave rise to the Injunctions, the Statute of Edward VI. against images, and the Homily against Peril of Idolatry, is in nowise absent in the present day: Charge of the Bishop of St. Asaph, *Guardian Newspaper*, Feb. 25th, 1874. There is no doubt that a carved and sculptured altar-piece, such as the reredos in this case, would have been considered at the time of the Reformation to be contrary to the injunctions and ordinances relating to images. Why should a different construction prevail in these days? It is an undisputed proposition that the laws of the Church must be tested by the feeling prevailing in the primitive Church: and if rightly interpreted, according to this principle, the ecclesiastical law requires that all such images as those set up by the appellants should be destroyed. It is true that in the first period of the Reformation only such images as had been abused were prohibited: Burnet's Reformation, vol. i. pt. 2, 281; but when it was found that the peril of idolatry was not taken away, it was wisely resolved, to avoid contention as to what images were abused; that all images inside churches, whether abused or not abused, should be pulled down and defaced; and one of the laws then enacted still remains

(1) 2 Q. B. 1. (2) 1 Ld. Raym. 447.

unrepealed, the 3 & 4 Edw. 6, c. 10, and under it all sculptures in churches, except on tombs or monuments, are forbidden. The definition of image in the Act would include anything graven and figures more or less rounded, but pictures or glass windows do not come within its provisions, and their legality is not affected by it. The statute is not a temporary one, and the prohibition contained in it against images necessitates the destruction of images standing in churches at the present day: Roger Twysden, Historical Vindication of the Church of England in point of Schism, p. 213; Hallam's Constitutional History, vol. i. p. 86; Staveley's History of Churches, ed. 1783, p. 245; Wheatley's Common Prayer, p. 86; Burnet's Reformation, vol. i. p. 486; vol. ii. p. 123; vol. iii. p. 306; Collier's Ecclesiastical History, vol. v. p. 376; vol. vi. p. 260.

The Act moreover extends to architectural decorations; and indeed the Judicial Committee of the Privy Council in the case of *Westerton* v. *Liddell* (1) thought it necessary to consider whether even crosses were not illegal under its provisions. Whether or not, therefore, the reredos and the images thereon are liable to abuse or to become objects of superstitious reverence, they ought to be removed. With respect to the case of *Cocke* v. *Tallents* (2), it does not clearly appear that the effigies in that case were not paintings; if so, it accounts for the fact that the statute 3 & 4 Edw. 6, c. 10, is not referred to in the libel of appeal in that case. Moreover, the effigies and pictures for the erection of which the faculty was granted in that case seem to have been ultimately pulled down: *Gentleman's Magazine* for 1736, p. 597.

Phillimore, in reply. In the case of brawling in the cathedral, tried in the Court of the Dean in 1827, it appears by the records in the registry that the surrogate signified the contumacy of the party accused to the King in Chancery. If the jurisdiction was merely archidiaconal he could not have done so: Phillimore's Eccl. Law, p. 1403.

[In the course of the arguments the following additional authorities were referred to: *Randolph* v. *Milman* (3); Phillimore's Eccl. Law, p. 1792; Comyns' Digest, tit. "Visitor" ed. 1827; *Green* v. *Rutherforth* (4); Report of Cathedral Commission, 1854,

(1) Moore's Special Report, p. 161.
(2) Arches, 1684; not reported.
(3) Law Rep. 2 C. P. 60; Law Rep. 4 C. P. 107.
(4) 1 Ves. Sen. 462.

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pp. 184, 185; *Hebbert* v. *Purchas* (1); Evelyn's Memoirs, vol. iii. p. 220; Strype's Annals, vol. i. pp. 74, 257, 262, 274, 322, 409, 500; Homily against Peril of Idolatry, Oxford edition, pp. 158, 159, 170, 180, 199, 200, 215, 218, 220; Cardwell's Documentary Annals, vol. i. pp. 50, 93, 221, 242, 268, 271, 321, 356; Fuller's Church History; Oliver's Hist. of Exeter, pp. 121, 123; Gray's Examination of Neale's Hist. of the Puritans; Whitelock's Memorials, ed. 1732, p. 88; Tenison on Idolatry, ed. 1678, p. 278; Pocklington's Altare Christianum, p. 87; Hey's Lectures, 2nd ed. vol. ii. bk. iv. 35th art. sec. 2, p. 463; Burnet's Reformation, ed. 1829, vol. i. pt. 1, p. 501; vol. ii. pt. 1, pp. 56, 59, 794; vol. ii. bk. 2, p. 544; The Case of Proxies (2); Westcote, Devonshire, p. 153; Calvin's Institutes, lib. 1, c. 11; Strype's Life of Parker, vol. ii. p. 151; Later Writings of Bishop Hooper, p. 57; Works of Bishop Ridley, p. 52; Oliver's Lives of the Bishops of Exeter, vol. i. pp. 198, 199; Mercurius Rusticus, p. 159; Zurich Letters, First Series, pp. 66, 67, 73; *Noble* v. *Voysey* (3); Publications of the Surtees Society, Acts of the High Commission Court, pp. 221 n., 228; Perry's Lawful Church Ornaments, pp. 304, 305; *Martin* v. *Mackonochie* (4); 1 & 2 Vict. c. 106; Peacocke's English Church Furniture, pp. 30, 33, 114, 133, 134, Appendix.]

Cur. adv. vult.

Aug. 6. SIR ROBERT PHILLIMORE. This is a case of considerable importance. It has been argued with much ability and learning before me, and I gladly take this opportunity of thanking the counsel on both sides for the assistance which their industry and talent have rendered to the Court.

This is an appeal from a judgment of the Lord Bishop of Exeter as "visitor and ordinary" of the cathedral church of Exeter. At the petition of the Venerable William John Phillpotts, chancellor of the diocese, archdeacon of Cornwall, and prebendary of the cathedral, the bishop held "an episcopal visitation" of his cathedral and of the dean and chapter thereof. The object of the petitioner was to obtain the removal of a structure recently erected in the cathedral called a "reredos."

(1) Law Rep. 3 P. C. 605.
(2) 1 Dowy's Rep. 1.
(3) Law Rep. 3 P. C. 357.
(4) Law Rep. 2 A. & E. at pp. 224, 232; Law Rep. 2 P. C. at pp. 388, 389.

The articles on this subject preferred by the visitor and the answers of the dean and chapter were as follows:—[His Lordship here read the articles of inquiry and the answers as set out above.]

The last article appears to me a rather singular question from a visitor.

The bishop ordered this structure to be removed, and "either a stone screen without images thereon to be erected, or an open ironwork lately erected and now standing on each side of the reredos to be continued so as to occupy its place," and the Ten Commandments to be set up at the east end of the choir of the cathedral.

From this judgment the dean and canons appealed to this Court; the respondent appeared at first under protest and denied the jurisdiction of this Court. The Court, after hearing counsel on both sides, pronounced against the protest, and assigned the respondent to appear absolutely. In that sentence the respondent has acquiesced. Nevertheless, as much confusion and doubt appears to have prevailed in the present and other instances of episcopal visitation of a cathedral, both as to the nature, authority, and legal incidents of such a visitation, and as to the right of appeal from the acts of the ordinary as visitor, I think it expedient to make a few preliminary remarks on both subjects.

It is legally competent to the bishop to visit his cathedral, either at the triennial visitation of his diocese or at a special visitation of the cathedral.

It is the latter kind of visitation which, as I collect from the circumstances of this case, the bishop has exercised in the present instance.

His authority has been invoked and put in ure as visitor of the cathedral alone, but nevertheless it is the ordinary episcopal authority with which he is clothed on these occasions, and not the special authority which belongs only to the visitor of a college or private foundation.

A certain test by which the two jurisdictions, that of the visitor of a college and of a cathedral, may be distinguished is the liability to an appeal. In the former case there is no appeal, in the

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latter there is: *The Bishop of St. David's* v. *Lucy* (1); *Philips* v. *Bury*. (2)

Many instances are to be found of appeals, according to the usual course of ecclesiastical law, from the acts of the ordinary as visitor of a cathedral.

Thus in 1716, in the case of Leneve Boughton, an appeal from the dean and chapter of York was prosecuted to the archbishop as visitor of the cathedral, and from his sentence to the Delegates (3); so an appeal from the sentence of the Archbishop of Dublin as visitor against a prebendary in 1718–19 was prosecuted to the Delegates: *Harrison* v. *The Archbishop of Dublin* (4); so in the case of *Philip Havers, Clerk*, v. *The Bishop of London* (5), in 1679, there was an appeal from an act of the bishop on his triennial visitation to the Court of Arches and the Delegates. In 1740, in the case of *Wynn* v. *Sager and others*, on the charge of alleged violation of the Statutes of the cathedral of Salisbury, which was heard before the Bishop of Salisbury, there was an appeal to the Arches and to the Delegates. (6)

I am of opinion, therefore, that the appeal has been rightly brought to this Court.

The bishop conducted this visitation under the advice and assistance of Sir Henry Singer Keating, one of the judges of the Court of Common Pleas, and in accordance with two opinions of that learned assessor pronounced, in the first instance, that he had jurisdiction as visitor over the fabric of the cathedral; and in the second instance that the reredos was illegal:—

First, because it was erected without a faculty granted by the bishop.

Secondly, because it contained images which were illegal and contrary to the laws ecclesiastical of this realm.

The question as to the jurisdiction of the bishop over the fabric and the question as to the necessity of a faculty are so interwoven that I think they must be considered together.

(1) 1 Ld. Raym. 447.
(2) 2 T. R. 346, 353.
(3) Page 66 of Printed Return to the House of Commons of Appeals to the Delegates, 5th July, 1865, No. 134.
(4) Ibid. 66, No. 135.
(5) Ibid. 31, No. 69.
(6) Ibid. 79, No. 160.

The appellants, as I understand their argument, do not dispute a power of the bishop to visit, but they contend that this power is limited both by the general law which governs the relations of a bishop to the cathedral and by the special privilege of the dean and canons of Exeter. I will say a word or two upon the latter question first.

The learned assessor says " . . . . it seems to me that the right of the bishop to visit this cathedral, with all those rights that belong to an ordinary episcopal visitation, exists at the present time." (1) The words " ordinary episcopal visitation " would properly denote the triennial visitation of the bishop, which does indeed usually commence with the visitation of the cathedral.

But this does not appear to be the character of this visitation, which was an extraordinary and special visitation, holden at the application of a particular person to remedy a particular grievance.

This is proved by the citation to the dean and chapter, which is in the following words :—

" Whereas the Venerable William John Phillpotts, prebendary of our said cathedral church and archdeacon of Cornwall, in our diocese of Exeter, hath presented to us a petition, dated the 9th day of June, 1873, praying us to exercise our power as visitor of our said cathedral of Exeter to visit the dean and chapter of our cathedral of Exeter aforesaid, and to inquire into the recent erection of a reredos in the choir of our said cathedral church, with certain images thereon, not being on any tomb, or in any painted window, such erection having been made, as alleged by the petitioner, without our consent, and the images aforesaid so placed being in themselves contrary to the laws ecclesiastical of this realm, as the petitioner, when called upon, alleges he is ready to prove; and further praying that, on such proofs being made clear to our satisfaction, we would order the removal of the images aforesaid, and the substitution of the Ten Commandments in their stead."

I may here observe that the other episcopal visitations of the cathedral referred to seem to have been during the triennial visitation. Such is my inference, at least, from the words " primary

(1) Ante, p. 302.

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visitation." (1) And in *Dean of York's Case* (2) the visitation, though not part of the triennial visitation, was not confined to a special purpose, like the present, but was a visitation of the whole cathedral.

The case of *Parham* v. *Templar* (3) has been much relied upon, and it is a case of very great importance. The dean and chapter had at that time a peculiar, in which they granted probates of testaments. Their Peculiar Court decided a case relating to a pew in the nave of the church of Ashburton, and the question to be decided by that most learned ecclesiastical judge, Sir John Nicholl, was whether the appeal lay to the Consistory Court of Exeter or to the Court of Arches. Sir John Nicholl, in a very careful and elaborate judgment, ruled that the appeal lay to the Arches.

" . . . I am not aware," he said, " that one instance is to be found in which an appeal has been brought from deans and chapters to the bishop, and afterwards from the bishop to the archbishop. The conclusion which I draw from this view of the subject is this, that as by the general rule of law a peculiar is not subject to the ordinary authority of the diocese, so the appeal does not lie from the peculiar, and more especially the peculiar of a dean and chapter, to the diocesan, but to the metropolitan. The peculiar in question is that of the dean and chapter of Exeter, which is clearly of the species I have just taken a view of—namely, exclusive of the bishop in the hearing of causes, and exempt from the bishop in point of visitation." (4)

Again he says: "The general result of this is that a peculiar is not subordinate to, but co-ordinate with, the jurisdiction of a bishop." (5)

And again: " Now upon these authorities, the practice, the propriety, and the reason of the thing lead to the same conclusion;

(1) The visitation book, deposited in the registry of the bishop of Exeter, contains the articles administered at the visitation of Bishop Seth Ward. The heading of such articles was referred to at the hearing at Exeter and was found to be as follows:—" Articles administered to Mr. Deane and to ye Canons and Vicars Chorall of the Church of St. Peter in Exon, by the Right Rev. Father in God Seth, by Divine Providence Lord Bishop of Exeter, at his *primary visitation* thereof, February the 18, in ye yeare $166\frac{2}{3}$."

(2) 2 Q. B. 1.

(3) 3 Phillim. Eccl. 223.

(4) 3 Phillim. Eccl. at pp. 250, 251.

(5) 3 Phillim. Eccl. at p. 248.

and if the bishop have no concurrence whatever in the hearing of causes, and if the bishop have no right of visitation, he seems to be in no one particular the ordinary of the place; but the peculiar is quoad hoc co-ordinate with the bishop, and the only appeal is to the metropolitan. There may, indeed, have been specially and originally reserved to the bishop some particular acts; such as the granting probate to the will of persons of higher degree, and the granting of licences; and certainly, as far as these exceptions go, the peculiar does not exclude the bishop. But if the peculiar has the hearing of causes as well 'ad instantiam partis,' as 'ex officio,' and is exempted from visitation, it should seem, in common propriety, that his superior is not the bishop, but the metropolitan." (1)

The appellants accordingly contend, not that the cathedral is exlex, but subject to the jurisdiction of the archbishop of the province.

Now certainly, after such a judgment as this, the burden of showing that the privilege of exemption claimed by the dean and chapter has ceased, lies upon the petitioner in the court below, the respondent here.

He seeks to discharge it principally by the allegations that the peculiar has been destroyed by an Order in Council, and that the dean and chapter have admitted as much in answer to questions issued by the cathedral commission.

The Order in Council declares all peculiar and exempt jurisdictions within the diocese of Exeter abolished, "except that the cathedral church of Exeter shall remain and be subject to the same jurisdiction and visitation to which the same is now by law subject, and to none other:" Order in Council, gazetted the 22nd of February, 1848. (2)

The cathedral commission in 1852 contained a variety of questions to deans and chapters, the 9th of which was as "to the relations" between the chapter and the bishop of the diocese, and asks whether they are defined by any statute, charter, or composition.

The answer of the dean and chapter of Exeter was: "The relation of the bishop to the chapter is that of visitor. The rights

(1) 3 Phillim. Eccl. at p. 249.

(2) Eccl. Com. Orders in Council, vol. vi. pp. 135, 138.

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of the bishop in the cathedral are those of bishop of the see. The chapter are not aware of any definition of such relation by royal charter, by the statutes, or any composition. The present bishop holds with the bishopric the dignity and office of treasurer, and a place of canonry. As such he holds the separate endowment of the dignity, and takes his share as canon of the common fund. The bishop has no other payment from the chapter." (1)

The learned assessor was much impressed by this answer, inasmuch as it contained no limitation of the bishop's power as visitor, and it appears to have been mainly, if not exclusively, upon this ground that he advised the bishop to proceed with the visitation.

I confess that this seems to me rather a large conclusion to draw from slender premises. If the privileges contended for did exist in fact and in law at the time of the answer, it seems to me difficult to say that an inaccurate or meagre statement in the answer could destroy them, while the language of the Order in Council, which is in effect a statute, appears carefully to preserve them.

I think the point is one of considerable difficulty, while the great respect which I feel for the opinion of the learned assessor, who felt no doubt about it, makes me very anxious to avoid, if I can do so with justice to the suitors, arriving at a decision not in accordance with his.

Now, inasmuch as the appellants do admit a power of visitation in the bishop, and as the whole of their argument against the particular exercise of it in the present case is substantially founded upon the general relations subsisting between all deans and chapters and their bishops, rather than upon the peculiar relation alleged to subsist between the dean and chapter of Exeter and their bishop, I think I may proceed to decide this case with respect to the former alone.

But I wish to make here a preliminary observation which appears to me not unimportant in its bearing upon every part of this case.

The special episcopal visitation which the bishop has made in this case was not for the purpose of enforcing old nor of making new statutes—I am not adjudicating upon his power in this matter.

(1) Cathedral Commission, 1st Report, Appendix, Answers from Chapters, p. 193.

This visitation has for its object the enforcing the general ecclesiastical law, whatever that may be, with respect to the fabric of the cathedral. But the general ecclesiastical law, whether it relate to inanimate things like the building and ornaments, or to the persons of the cathedral officers, must be enforced by that Court which properly has jurisdiction over the subject-matter, and can execute its decrees; the members of the cathedral body are certainly visitable by the bishop, and all offences committed by them against the ecclesiastical law, whether doctrinal or moral, are, no doubt, in a sense corrigible by him; but not since *Dean of York's Case* (1), summarily, and at the time of visitation, as fellows of a college are corrigible by their visitor, but by subsequent process in a regular court. So an offence against the common law, such as stealing the Holy Communion plate, may be inquired into and detected at the bishop's visitation; but the real punishment of the offender would be effected through the agency of the ordinary criminal court.

I asked during the course of the argument how it was proposed to enforce the order of the bishop in this case, but I received no answer.

The bishop, under the advice of his learned assessor, founded, as I have said, his judgment against the dean and canons partly upon the grounds that the reredos had been put up without a faculty.

The proposition of ecclesiastical law involved in this part of the sentence has very greatly surprised me. After an experience of no ordinary length with the subject of faculties, which, as chancellor of various dioceses before I occupied my present position, I have often been compelled to consider in all its bearings, I could not recollect a single instance in which a dean and chapter had asked for or obtained a faculty from the bishop for alterations in their cathedral. It has been admitted that, after a careful search, no record can be found of such a faculty having ever been issued for the cathedral of Exeter, the interior of which not only appears to have often undergone alterations, but which actually contained a reredos with paintings on it (for which the present reredos was substituted) put up in 1823 without a faculty.

(1) 2 Q. B. 1.

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It would not have surprised me to learn that in some cathedrals which included within their walls—as Chichester and Carlisle Cathedral did formerly, and as I believe Bangor Cathedral does still—a parochial church, a faculty had been obtained from the Consistorial Court for alterations in such a parochial church, and upon inquiring I find that in 1813 a faculty so specially limited was granted in the diocese of Carlisle. The faculty recites that a certain part of the cathedral had been, by permission of the dean and chapter, used as a parochial church; that the dean and chapter had applied for a faculty to erect a gallery and seats in that peculiar part, and such faculty was granted in and issued from the Consistorial Court. The parish church itself was afterwards removed from the cathedral without a faculty. This particular and, I believe, solitary exception seems to strengthen the general rule to the contrary. When the nature of the instrument called a faculty is duly considered, the reason why the obligation of obtaining one for alterations in a cathedral has never yet been imposed upon a dean and chapter, is pretty evident.

A faculty is, properly speaking, a licence issued by the ordinary through his Consistorial Court—formerly some peculiar as well as all consistorial courts had this jurisdiction—to effect certain alterations of a grave character in a parish church. The issue of this instrument is preceded by a citation affixed to the church door calling upon all parishioners to shew cause, if they desire to do so, against the grant of the faculty upon a certain day in the Court; if they do appear a suit begins and is prosecuted in the usual manner. In many cases the discretion of the ordinary alone is invoked, and the legality or illegality of what is proposed to be done is not mooted. Now if there are no parishioners to cite in the case of a cathedral—for it is not to be supposed that the maxim that the cathedral is the parish church of the diocese would entitle all the inhabitants of the diocese to be cited—it could not be seriously maintained, for example, that the dean and chapter of St. Paul's must obtain a faculty from the bishop's consistory to render legal the embellishments now in process of being effected in their cathedral, in which case all the parishioners of London (and indeed the whole diocese) would have a right to be cited before the faculty issued.

Nor can any consequence of importance be drawn from the fact that generally the close, that is, the claustrum, or immediate precinct of the cathedral, is considered as a sort of parish for the purpose of publications of banns of marriage and other matters; neither of these circumstances interfere with the legal position that the primary discretion, at least, if not the ultimate discretion, in all that relates to the ornaments and structure of their own cathedral, is vested in the dean and chapter. The fact was admitted, and indeed could not be denied, that in the cathedrals of St. Paul's, Worcester, Salisbury, Chichester, Chester, and Llandaff, very material, extensive, and substantial alterations had been effected without a faculty; other cathedrals might, I think, be added to the list.

The Queen's Bench said, in *Dean of York's Case* (1): "The law can only be established by practice and precedent. Both are wanting here," and so are both wanting in this matter of a cathedral faculty, and against this universal negative of practice and precedent is not to be set the obiter dictum of even so great a judge as Lord Stowell, that an ordinary might compel the erection of an organ in a cathedral (2), even if that dictum supported, as in truth it is very far from doing, the position that an episcopal faculty was necessary whenever an important alteration was made in a cathedral.

And here this remark occurs to me. The peculiar Courts of deans and chapters, exempt as that of Exeter once was, from the jurisdiction of the bishop, exercised to a great extent the functions of the ordinary, and not only adjudicated upon questions of testaments and marriages (to say nothing of their criminal jurisdiction), but also as a matter of course upon questions of faculties. A well-known instance is the case of the painted window of St. Margaret's, Westminster, in the Commissary's Court of the Dean and Chapter of Westminster (1758–60). (3)

I have not been able to discover any single instance in which a dean and chapter caused a faculty to issue from their own court

(1) 2 Q. B. at p. 38.

(2) *The Churchwardens of St. John's, Margate*, v. *The Parishioners of the same*, 1 Hagg. Cons. 198, 199.

(3) Page 85 of printed Return to the House of Commons of Appeals to the Delegates, 5th July, 1865, No. 171.

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for alterations in their own cathedral. The reason appears to me obvious; they were the only persons legally interested, and what was done was necessarily done by their authority. A faculty, therefore, was not required, and in no one instance obtained.

It must be remembered, with reference to this as well as other relations of the dean and chapter to the bishop, that they are, properly speaking, his council; that they are, as Bishop Stillingfleet says, episcopi confratres, consiliarii assessores, membra episcopatûs. "The dean and chapter (Lord Coke says) were appointed as a council to the bishop with whom he is to consult in all cases of difficulty, to which purpose every bishop habet cathedram, and who are to consent to every grant, &c.;" and he adds, "although they should depart with their possessions, yet for necessity the corporation doth remain, as well to assist the bishop in his calling as to give their assent:" Phillimore's Ecc. Law, vol. i. 148; 3 Rep. 75. The bishop indeed has his throne in the cathedral, and has a right to preach in it, but it is manifest that the relations of the dean and chapter to the ordinary are very different from those of the clergy generally. The dean and chapter have privileges which parochial incumbents and curates have not, both with respect to the services in their cathedrals, the fabric itself, and various other matters; and, as has been shewn, their consent is required in order to confer validity on certain acts of the bishop.

This observation may tend to explain in some degree the difficulty which would arise as to the enforcement of the injunctions of the bishop, as visitor, when he acts personally as visitor, or otherwise than through his court.

The inquiries and subsequent injunctions of the ordinary or visitor, to be found in the books and in the records of this and of other cathedrals, were often, it is to be hoped, and should always have been, the result of previous counsel taken with the dean and chapter, and were generally, though certainly not always, obeyed.

In the appendix to the report of the Cathedral Commissioners (1854), I find the following confirmation of my opinion with respect to the present case: "The statutes," it is there said, "which govern the church of Exeter were enacted from time to time, pro re natâ. They were framed in the form of injunctions from the bishop, as

visitor, requiring the more accurate observance of existing ordinances or of new statutes, either suggested by the chapter to the visitor or framed by him at their request and with their concurrence, and finally accepted by the body. No instrument has ever been allowed to be of any force unless ratified by the bishop and chapter, and authenticated by the seals of both" (1): Appendix to the First Report of Cathedral Commissioners, 1854, p. 183; "Exeter Cathedral (Constitution of the Chapter)."

In one of the latest visitations of the dean and chapter there is an entry in the acts of the dean and chapter (Dec. 22, 1731), from which it appears that at a chapter at which the dean and all the canons were present, it was ordered that a memorandum should be made in the statute book to the effect that certain "pretended statutes," as they are described, entered in the name of Bishop Wootton, were never confirmed by the dean and chapter, and are therefore to be considered as "invalida et irrita."

Now from the year 1709 down to the death of the late distinguished bishop, the Bishop of Exeter was always a canon, and it appears that the then bishop of the diocese himself was present and an assenting party to the order which declared these statutes of Bishop Wootton to be null and void.

A careful consideration of the whole of this question, with reference both to principle and to practice, leads me to a clear conclusion that the absence of an episcopal faculty does not render the erection of this reredos illegal.

Now the answer to the twin question (if I may so express myself), viz., as to the power of the bishop to order the removal of the reredos without the consent of the dean and chapter, seems in great measure to be anticipated by the decision upon the question of the faculty.

I am of opinion that the bishop acting alone had not the power to order the removal of the structure any more than he had the

(1) The bishop, with the advice of the dean and chapter, enacts rules for the government of the cathedral church; Lichfield, Dugdale iii. 239–256; Ed. 1673, viii. 1240–1265, Ed. 1830; Wells, Wilkins, Concilia magnæ Britanniæ et Hiberniæ (London, 1737), i. 683; Salisbury, ibid. i. 715; St. Paul's, Strype's Life of Grindal, bk. i. c. vi., bk. ii. c. ii.; York, Grindal's Remains (Parker Society's Ed.), pp. 145, 153."

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power, acting alone, to prevent its being put up. But inasmuch as I may be wrong, and as I think the parties have a right to the judgment of this Court upon the most important part of this case, namely, the legality of the structure itself, I will not shrink from the labour and responsibility of giving my judgment on this point also.

I will assume, therefore, that the bishop had jurisdiction over the fabric of the cathedral, and had power to order the removal of an illegal structure therein, and I proceed to consider whether the sentence of his Lordship pronouncing the reredos to be illegal was or was not well founded in law.

And first, what kind of structure is a reredos in the general and usual sense of the term?

A reredos is, I learn from "The Glossary of Architecture," published in 1840, a sort of screen at the back of the altar, called also lardos, l'arrière-dos. The same authority informs me that: "The reredos at the back of the side altars frequently remains in our cathedrals, and also in country churches, when the altar itself is destroyed. Sometimes the figures in the niches of the reredos remain perfect, or nearly so, as at Hanwell, near Banbury, Oxon. More frequently the niches are empty, as at St. Michael's, Oxford. At Enstone, Oxon, a plain stone altar with its reredos still remains:" Glossary of Architecture, part I., p. 174, and plate 67.

Since the date of this publication, thirty-four years ago, reredoses have been restored in many of our cathedrals.

The objection against the reredos per se without figures seems to be that it was put up without a faculty, for the former stone screen was in effect the reredos without figures. It was a solid screen in compartments, with Gothic ornaments extending across the whole east end of the choir. The removal of this screen is declared by the bishop to have been illegal. But the present reredos with the figures is ordered to be removed. The substantial question is, whether the particular figures rendered this stone screen reredos illegal.

The next inquiry is, what is the character of this particular reredos?

The answer of the dean and chapter is: "There are on such reredos sculptured representations in bas-relief of the three follow-

ing historical scenes; that is to say, the Ascension of Our Blessed Lord, the Transfiguration of our Blessed Lord, and the Descent of the Holy Ghost on the Day of Pentecost: there is an angel at each side of the reredos, and two other angels, one on each side of the cross which surmounts the reredos. All these articles were cut or carved out of the actual structure during the progress of the reredos."

Surely, apart from all legal considerations, it would be difficult to conceive a series of representations more likely to edify and instruct the spectators in Christianity, and less obnoxious to the charge of superstition than those which have been just described. Nevertheless, if such representations be prohibited by the law of the English Church, that law must be enforced by this Court.

In Mr. Phillpotts' argument images have been objected to on various grounds; the principal were, I think, the following:—

1. That they were contrary to the usage and practice of the pure and primitive Church:

2. That they were objects of especial censure by those who conducted the Reformation in England:

3. That they were ordered to be moved out of churches by various authorities having the force of law:

4. That there is a specific statute which renders them illegal:

5. That if it is a matter of discretion whether they shall be allowed to remain or not, that discretion ought to be exercised in favour of this removal, inasmuch as they tend to idolatry, forbidden by the second commandment, and to superstitions favoured by the Church of Rome and rejected by the Church of England.

There was another objection which I mention, a little perhaps out of its place, because I think it may be disposed of at once. It is the objection that the Ten Commandments have been displaced to make room for this reredos. The answer of the dean and chapter is that they intend to comply with the injunction of the canon in this case by placing the commandments on the east wall where they can be seen by the people; and Sir Henry Keating observes with perfect accuracy, "As however the Judicial Committee in the case of *Liddell* v. *Beal* (1) held that the requirements of the law can be fulfilled in some cases without

(1) 14 Moo. P. C. 1, 8.

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placing the commandments over the table, provided they are so placed as to be read by the people, it must, I think, be taken to be the intention of the dean and canons so to place the commandments as to be a compliance with the law."

It is true that, nevertheless, the bishop has made an order upon this subject also; but I entirely agree with Sir Henry Keating both in his statement of the law and in his opinion, that it is to be presumed in this case that the dean and chapter intend to obey it. I pass by, therefore, this objection.

With respect to the other objections, I hope I have correctly stated, as I have endeavoured to do, the heads under which Mr. Phillpotts arranged his able argument, and I propose to deal with them in succession, and pretty much in the same order.

An anxious care to avoid the idolatry of the Jews and the Gentiles was no doubt the reason why, in the earliest Christian history, the Acts of the Apostles, we find St. Stephen applying the words of the prophet Amos to the Israelites, and rebuking them "for the figures which ye made to worship them," "*τοὺς τύπους οὓς ἐποιήσατε προσκυνεῖν αὐτοῖς.*" (Acts of the Apostles, vii. 43.)

During the first three centuries images in churches were very rare, if they existed at all. Fleury, indeed, states, upon the authority of Tertullian, that there were images in some churches, and upon the vessels used in divine worship. (Histoire Ecclésiastique, tom. 2, l. v. p. 54.) The warning of St. John (1 John v. 21) against idols related to the sacrifices offered by the heathen to their idols, from which Christians were admonished to abstain. But the New Testament being silent on the subject of images generally, the moral text of the second commandment appears to have been considered binding upon Christians. And Tertullian, in his answer to the Marcionites, observes that the Jews were not prohibited from having images unless they worshipped them, and that therefore there was no contradiction between the second commandment and the cherubim ordained for the ark, or the brazen serpent (Fleury, Histoire Ecclésiastique, tom. 2, l. v. p. 54). The words of Tertullian are: "Sic et cherubin et seraphin aurea in arcæ figuratum exemplum certe simplex ornamentum, accommodata suggestui, longe diversas habendo causas ab idololatriæ conditione, ob quam similitudo prohibetur, non videntur similitu-

dinum prohibitarum legi refragari, non in eo similitudinis statu deprehensa ob quem similitudo prohibetur." (Tertull. Opera, Adversus Marcionem, lib. ii. cap. 22.)

As the authority of the second commandment was a part of the argument addressed to me against the use of graven images in a church, it is not irrelevant to advert to the opinion of Bishop Taylor upon this point. Referring to the prohibition in the second commandment, he does not mention the two cherubim of gold on the ark, stretching forth their wings on high and their faces looking one to another, and toward the mercy seat (Exodus xxv. 20), or "the molten sea, and under it the similitude of the twelve oxen which did compass it about," or "the two cherubim of image work overlaid with gold" (1) (II. Chronic. iii. 10, iv. 2, 3); but he observes: "But when we consider further, that Solomon caused golden lions to be made about his throne, and the Jews imprinted images on their money, and in Christ's time they used the images of Cæsar on their coin, and found no reprover for so doing, this shews that there was something in the commandment that was not moral; I mean the prohibition of making or having any images. For to these things we find no command of God, no dispensation, no allowance positive; but the immunity of reason, and the indemnity of not being reproved: and therefore, for so much as concerns the making or having pictures and images, we are at liberty, without the warranty of an express commandment from God" (Rule of Conscience, rule vi., Bp. Taylor's Works, vol. xii. Heber's edn. p. 397).

Some of the Fathers of the primitive church condemned the arts of painting and sculpture as in themselves wicked, and declared, as Jeremy Taylor says, that "God forbade the very trade in itself" (Bp. Taylor's Works, vol. xii. p. 395). But he adds, "Now if this sense was also in the commandment, it is certain that this was but temporary; and therefore could change:" and he cites the instances of God's assisting Bezaleel and Aholiab (p. 396).

"I conclude" (he says) "that the second commandment is a

(1) "Videatur fuisse humanâ specie instar juvenum alatorum ut angeli apud nos pingi solent ad repræsentandum eorum perennitatem, vivacitatem, vigorem, celeritatem."—Cornel. Jansen Episcop., Iprensis Pentateuchus, p. 315.

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moral and natural precept in the whole body and constitution of it, if the first words of it be relative to the last; that is, if the prohibition of making images be understood so as to include an order to their worship: but if these words be made to be a distinct period —then that period was only obligatory to the Jews, and to Christians in equal danger, and under the same reason; and therefore can also pass away with the reason, which was but temporary, transient, and accidental; all the rest retaining their prime, natural, and essential obligation," (Bp. Taylor's Works, vol. xii., Heber's edn., p. 412, "Of the Christian Law" § 42.)

The use of images, however, increased as the church increased, though the Council of Eliberis (A.D. 305) by its 36th canon said, "Placuit picturas in ecclesiâ esse non debere, ne quod colitur et adoratur in parietibus depingatur." It will be observed that this canon is against painted pictures.

But the struggle against the natural course of events was vain. It was apparent that there was a language to be addressed to the eye as well as the ear, that men might be taught by form and colour as well as by sound, and that many incapable of the latter were capable of the former kind of education.

Gregory the Great wrote to Serenus, Bishop of Marseilles, who had broken images in churches, a letter full of good sense (1):— " . . . Perlatum siquidem," he says, "ad nos fuerat, quod inconsiderato zelo succensus, sanctorum imagines sub hâc quasi excusatione, ne adorari debuissent, confregeris. Et quidem quia eas adorari vetuisses omnino laudavimus, fregisse vero reprehendimus. Dic, frater, a quo factum sacerdote aliquando auditum est quod fecisti? . . . Aliud est enim picturam adorare, aliud per picturæ historiam quid sit adorandum addiscere. Nam quod legentibus scriptura, hoc idiotis præstat pictura cernentibus, quia in ipsâ etiam ignorantes vident quod sequi debeant, in ipsâ legunt qui liberas nesciunt. Unde et præcipue gentibus pro lectione pictura est . . . Frangi vero non debuit, quod non adorandum in ecclesiis, sed ad instruendas solummodo mentes fuit nescientium collocatum."

The distinction here taken between the use and abuse of images

(1) S. Gregorius — Opera omnia, "Epistolarum ex Registro," lib. ix., Indictione iv., Epist. ix. (p. 438 g., ed. 1533, Paris).

was one never entirely lost sight of by our church, though during one period much obscured.

We pass on to the eighth century, which the learned Cave calls "sæculum eiconoclasticum." He says, "Totum pene sæculum exercet famosa de cultu imaginum controversia." (1)

All persons acquainted with the history of this period are aware that the Greek Emperor Philip, and John the Patriarch ejected images from the church of Sancta. Sophia by an edict in 713, the Roman Pope stoutly protesting against the act; that the Emperor Leo, called the Isaurian, passed a law in 706 against images in churches, and was excommunicated by the Pope; that the Emperor Constantine Copronymus convened the Council at Constantinople, called the Seventh, which in 741 decreed that images (*προσκυνήσεως* causâ) for purposes of worship were unlawful, both in churches and private houses—a curious sort of prototype of the statute of Edward VI.

Dean Milman remarks that "The cold naked walls, from whence the scriptural histories had been effaced, the despoiled shrines, the mutilated images, could not compel the mind to a more pure and immaterial conception of God and the Saviour." (Hist. of Latin Christianity, ii. 146.)

The Empress Irene, with her son Constantine, a minor, convened the Second Council of Nicæa in 776, which declared null the Seventh Council of Constantinople; each party raged furiously against the other; the reciprocal charges of idolatry and denouncers of Christ began to be freely made (2), and their influence has not yet expired.

This council ordered certain images to be set up in all churches and houses to be worshipped, lit up with tapers, and to receive other marks of worship (*προσκυνήσεως*).

(1) Cave—Scriptorum Ecclesiasticorum Historia Literaria a Christo nato usque ad sæculum, xiv. vol. i. p. 611. Oxon, 1740.

(2) "Tempore hujus concilii, atque ante æque ac postea, cultûs imaginum oppugnatores, *Christi sanctorumque imagines, eo nomine ut adorentur factas, idola* esse asseverarunt; ac proinde Christianos, qui eos colunt, idololatriæ accusârunt: quo factum est, ut ipsi, à contrariâ parte, sive ab imaginum cultoribus *χριστιανοκατηγοροι* audirent." Beveridge "Synodicon sive Pandectæ Canonum. . . . ." Vol. ii., annotationes in canones concilii Niceni secundi, p. 165, Oxon. 1672.

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"The worship of images," Mr. Robertson observes (2 Hist. of Christian Church, 2nd period, Bk. 2, Cap. I., p. 261—ed. 1856), "although only in the form of painting, not of sculpture, has ever since been retained by the Greeks."

Charlemagne, who was as determined as any Tudor sovereign that the church of his realms should be governed by neither Pope nor Patriarch without his consent, convened a synod of bishops at Frankfort in 794, and in the well-known Four Caroline Books refuted the edict of the Second Nicene Council, and decreed that images should not be worshipped though retained in churches. Our early English chronicler, Hoveden, writing about the same time, mentions the fact that Charlemagne communicated with England on the subject, and speaks himself of the adoration of images as execrated by the church. (1 Cave, Scriptorum Ecclesiasticorum Historia, vol. i. pp. 611, 612.)

"An image or an idol do not differ in themselves," says Bishop Taylor, "but by use and custom of speaking, the church calling it an image so long as it is used lawfully; but it is an idol when it is used unlawfully."

Then he cites, as expressing his own opinion, the words of the author of the Caroline Books, "nos *imagines in basilicis positas, idola non nuncupamus;* sed ne idola nuncupentur adorare et colere eas recusamus" (Bishop Taylor's Works, vol. xii. Heber's ed. p. 394, "Of the Christian Law," &c.).

At this period, as well as after the Reformation, our church endeavoured to take a *via media*, and agreed with the Council of Frankfort.

Gibbon sums up correctly the history of this time so far as it relates to the use of images in the non-Italian churches of Europe. "The churches of France," he says, "Germany, England, and Spain steered a middle course between the adoration and the destruction of images, which they admitted into their temples, not as objects of worship, but as lively and useful memorials of faith and history." (Vol. vi. ch. xlix. p. 165, Smith's ed.)

But as the popes became, after the destruction of the Exarchate of Ravenna and the subjugation of the Greek Church, more and more absolute; in this, as in so many other instances, they succeeded in converting an use into an abuse, and in grafting a

superstitious innovation upon an innocent and edifying practice of the Catholic Church.

Long before the period when Lyndwoode collected and commented upon the constitutions of the English Church, the adoration of images was practised and enjoined in it; and it is not unimportant, with reference to the construction of the law in England after the Reformation, to consider what was the previous law on this subject.

We learn from Lyndwoode that a provincial constitution of Archbishop Winchelsey, which relates to the duties of parishioners as to furnishing certain articles for Divine worship (*supellex rei divinæ*), orders them to provide certain books, ornaments for the minister and the altar, and among other things, "*imagines in ecclesia, imaginem principalem* in cancello . . . Reparationem navis ecclesiæ interius et exterius, tam in *imaginibus* quam in fenestris vitreis"; . . . Lyndwoode, in his gloss upon *imaginibus*, says, "scilicet crucifixi et aliorum sanctorum;" in his gloss upon imagines, he says, "sanctorum," &c., and proceeds to explain that "Sunt namque tales imagines . . . sanctorum libri et scripturæ laicorum. Ipsarum tamen imaginum pictura non est adoranda sed res per ipsam repræsentata." He says they subserve three purposes: (1) The instruction of the ignorant; (2) The reminding men of the Incarnation and of the examples of saints; (3) The excitement of devotional feeling. He then considers at length the distinction of latria and doulia, and says that the crucifix is "utroque modo . . . veneranda:" Lyndwoode, 1, 3, tit. 27, pp. 251–3.

III. The subtle distinctions which the Church of Rome endeavoured to establish between the λατρεία due to our Lord, the δουλία due to the saint, the ὑπερδουλία due to the Blessed Virgin, even if they had been, as they were not, well founded, were unintelligible to the people, and led to a very gross abuse in the direct worship of the images themselves.

I agree with Mr. Phillpotts, that this abuse fell under the especial censure of those who conducted the Reformation in England, and that they were bent upon the extirpation of it. At the same time, the wiser heads among them well knew what is ex-

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pressed in our 30th Canon, that "the abuse of a thing doth not take away the lawful use of it," and that it was "the wisdom of the Church of England" in this matter, as well as in her Liturgy, "to keep the mean between the two extremes": Preface to Prayer Book.

Latimer expresses himself as follows:—

"I said this word 'saints' is diversely taken of the vulgar people: images of saints are called saints, and inhabiters of heaven are called saints. Now, by honouring of saints is meant praying to saints. Take honouring so, and images for saints, so saints are not to be honoured; that is to say, dead images are not to be prayed unto . . . and yet I shewed the good use of them to be laymen's books, as they be called; reverently to look upon them, to remember the things that are signified by them, &c. And yet I would not have them so costly and curiously gilded and decked, that the quick image of God (for whom Christ shed his blood, and to whom whatsoever is done, Christ reputeth it done to himself) lack necessaries and be unprovided for by that occasion, for then the layman doth abuse his book": Sermons and Remains of Latimer, p. 233, ed. Parker Society, 1845.

And Archbishop Cranmer, in the Book of Articles, which he induced the Convocation of 1536 to pass, says of images:—

6 PC 439.

"That they be representers of virtue and good example. That they be stirrers of men's minds, and make them often to remember and lament their sins, especially the images of Christ and our Lady. That it was meet they should stand in the churches, but be none otherwise esteemed. That the bishops and preachers diligently teach the people according to this doctrine, lest there might fortune idolatry to ensue. That they be taught also that censing, kneeling, and offering to images be by no means to be done (although the same had entered by devotion and fallen to custom), but only to God and in his honour, though it be done before the images": Strype's Memorials of Archbishop Cranmer, b. 1. c. xi. vol. i. p. 160.

In 1537, The Institution of a Christian Man was published; it had been composed in convocation three years before under the auspices, it is believed, of Cranmer. It speaks as follows:—

"Second, that although all images, be they engraven, painted,

or wrought in arras, or in any otherwise made, be so prohibited that they may neither be bowed down unto ne worshipped (forasmuch as they be the works of men's hand only), yet they be not so prohibited, but that they may be had and set up in churches, so it be for none other purposes, but only to the intent that we (in beholding and looking upon them, as in certain books, and seeing represented in them the manifold examples of virtues which were in the saints, represented by the said images) may the rather be provoked, kindled, and stirred to yield thanks to our Lord, and to praise him in his said saints, and to remember and lament our sins and offences, and to pray God that we may have grace to follow their goodness and holy living. As for an example. The image of our Saviour, as an open book, hangeth on the cross in the rood, or is painted in cloths, walls, or windows, to the intent that beside the examples of virtues which we may learn at Christ, we may also be provoked to remember his painful and cruel passion, and also to consider ourselves, when we behold the said image, and to condemn and abhor our sin, which was the cause of his so cruel death, and thereby to profess that we will no more sin": Formularies of Faith, pp. 135, 136. (1)

In Cromwell's injunctions in the King's name, there were directions to the clergy "to remove such images as had been superstitiously applied to "pilgrimages and offerings, or treated with overproportionate regard." Curates were to instruct the people that the use of images was to inform the unlearned in the history of saints, and to refresh their memory.

Leaving the reign of Henry VIII. we come to that of Edward VI. (1546–7), the ecclesiastical acts of which require careful enumeration and investigation.

In 1547 some of the homilies, twelve in number, were put forth for the first time; they were chiefly compiled by Archbishop Cranmer; only one of them referred to images and relics, subjects by the way usually treated of together at this time. It was the Homily of Good Works. This is its language as to images:

"Never had the Jews, in their most blindness, *so many pilgrimages unto images, nor used so much kneeling, kissing, and censing*

(1) "Formularies of Faith put forth by authority during the reign of Henry VIII." Reprinted at the Clarendon Press, Oxford, 1825.

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of them, as hath been used in our time. Sects and *feigned* religions were neither the fortieth part so many among the Jews, nor more superstitiously and ungodly abused, than of late days they have been among us . . . .; keeping in divers places, as it were, marts or markets of merit, being full of their holy relics, *images*, shrines, and works of overflowing abundance ready to be sold; and all things which they had were called holy, holy cowls, holy girdles, holy pardons, holy beads, holy shoes, holy rules, and all full of holiness. And what thing can be more foolish, more superstitious or ungodly, than that men, women, and children should wear a friar's coat to deliver them from agues or pestilence? or when they die, or when they be buried, cause it to be cast upon them, and hope thereby to be saved?" (1)

" . . . . let us rehearse some *other kinds of papistical superstitions* and *abuses*, as of beads, of lady psalters, and rosaries, of fifteen O's, of St. Bernard's verses, of St. Agathe's letters; of purgatory, of masses satisfactory, of stations and jubilees, of *feigned relics*, of hallowed beads, bells, bread, water, palms, candles, fire, and such other . . . .": Homily "of Good Works" on Images and Relics. (2)

IV. In the year 1549 injunctions were issued by Edward VI., by virtue of 31 Hen. 8, c. 8, confirmed by 34 & 35 Hen. 8, c. 23, the Proclamation Statutes. In these injunctions it is said:

"Besides this, to the intent that all superstition and hypocrisy, crept into divers men's hearts, may vanish away, they shall not set forth or extol any *images*, relics, or miracles, for any superstition or lucre, nor allure the people by any enticements to the pilgrimage of any saint or *image:* but reproving the same, they shall teach that all goodness, health, and grace, ought to be both asked and looked for only of God, as of the very author and giver of the same, and of none other.

"2. Item. That they, the persons above rehearsed, shall make or cause to be made in their churches, and every other cure they have, one sermon every quarter of the year at the least, wherein

(1) "Certain Sermons or Homilies appointed to be read in Churches in the time of the late Queen Elizabeth of famous Memory." — p. 50, edition printed at the Clarendon Press, Oxford, 1840.

(2) Ibid. p. 53.

they shall purely and sincerely declare the word of God; and in the same exhort their hearers to the works of faith, mercy, and charity, specially prescribed and commanded in scripture; and that works, devised by men's fantasies, besides scripture, as wandering to pilgrimages, offering of money, candles, or tapers to relics or *images*, or kissing and licking of the same, and praying upon beads, or such like superstition, have not only no promise of reward in scripture for doing of them, but contrariwise, great threats and maledictions of God, for *that they be things tending to idolatry and superstition*, which of all other offences God Almighty doth most detest and abhor, for that the same diminish most his honour and glory.

"3. Item. That such *images* as they know in any of their cures to be or have been so *abused* with pilgrimage, or offerings of anything made thereunto, or shall be hereafter censed unto, they (and none other private persons) shall for the avoiding of that most detestable offence of idolatry, forthwith take down, or cause to be taken down, and destroy the same; and shall suffer from henceforth no torches, nor candles, tapers, or *images* of wax to be set afore any *image* or picture, but only two lights upon the high altar, before the sacrament, which for the signification that Christ is the very true light of the world, they shall suffer to remain still, admonishing their parishioners that *images* serve for no other purpose but to be a remembrance, whereby men may be admonished of the holy lives and conversation of them that the said *images* do represent; which *images* if they do abuse for any other intent, they commit idolatry in the same, to the great danger of their souls." (1)

(11.) "Also, if they have heretofore declared to their parishioners anything to the extolling or setting forth of pilgrimages, relics, or *images*, or lighting of candles, *kissing*, *kneeling*, *decking of the same images, or any such superstition*, they shall now openly, before the same, recant, and reprove the same: shewing them (as the truth is) that they did the same upon no ground of scripture, but were led and seduced by a common error and abuse, crept into the Church through the sufferance and avarice of such as felt profit by the same." (2)

(1) Card. Doc. Ann. vol. i. pp. 6, 7, Oxford, 1844.

(2) Card. Doc. Ann. vol. i. p. 10.

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(28.) "Also, that they shall take away, utterly extinct, and destroy all shrines, covering of shrines, all tables, candlesticks, trindles, or rolls of wax, *pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry and superstition; so that there remain no memory of the same in walls, glass windows, or elsewhere within their churches or houses.* And they shall exhort all their parishioners to do the like within their several houses. And that the churchwardens, at the common charge of the parishioners in every church, shall provide a comely and honest pulpit, to be set in a convenient place within the same, for the preaching of God's word." (1)

By this proclamation, having at the time statutable authority, it is clear that only abused images, including pictorial representations in widows and other places, were ordered to be removed. The next reference is to a document which has been greatly relied upon by the respondent.

On the 24th of February, 1547 o.s., Cranmer sent to the Bishop of London what is called, "Mandatum ad amovendas et delendas imagines," in which, among others, is the following passage:—

"After our right hartye recommendations to your good lordship; where now of late in the king's majestie's visitation, amonge other godlye injunctions commaunded to be generally observed throughe all partes of this his highnes realme, one was set forthe for the *taking downe of all suche images as had at any tyme ben abused with pilgrimages, offerings, or censinges;* albeit that this said injunction hathe in many partes of the realme ben wel and quyetlye obeyed and executed, yet in many other places muche stryfe and contentyon hath rysen and dayly ryseth, and more and more encreaseth, about the execution of the same, some men beyng so superstytyous, or rather wylfull, as they wold by theyr good wylles retayne all such *images styll, although they have beene mooste manyfestlye abused*, and in some places also the images whiche by the saide injunctions were taken downe, be now restored and set up againe, and almoste in every place ys contentyon for images, whether they have been abused or not; and whiles these men go about on both sides contentyouslye to obtain theyr mindes; contending whether this or that image hath been offered unto, kyssed,

(1) Card. Doc. Ann. vol. i. p. 17.

censed, or otherwyse abused, partyes have in some places ben taken in suche sorte, as further inconvenyance is very likely to ensue yf remedie be not provided in tyme; considering, therefore, that allmost in no places of this realme ys any sure quyetness, but where all images be hoolly taken awaye and pulled downe already, to the intent that all contentyon in everye parte of this realme for this matter may be clerely taken awaye, and that the lyvely images of Chryste shulde not contende for the deade images, whiche be things not necessary and without whiche the churches of Christ contynued most godlye many yeres. We have thought good to signify unto you that his highnes pleasure with th'advyse and consent of us the lord protectour, and the reste of the counsell ys, that immediately upon the sight hereof, with as convenyent diligence as you maye, you shall not onlye gyve ordre that *all the images remayninge in any church or* chappell within your diocese be removed and taken away, but also by your letters signifye unto the reste of the bisshopes within your province his highnesse pleasure for the lyke order to be gyven by them and every of them within their several dioceses; and in th'execution thereof we requyre both you and the reste of the bisshopes foresaid to use suche foresight as the same may be quyetlye donne with as good satisfaction of the people as may be." (1)

This document, whatever name it is entitled to, orders the removal of "all the images remaining in any church or chapel."

The injunctions I held in *Martin* v. *Mackonochie* (2) had legal authority.

But this document is of another kind. It derived no validity from the Supremacy Act, or from the Proclamation Act, for that was repealed before it issued. It is, in truth, a Latin letter by Cranmer to the Bishop of London, in which he recites an English letter from the Council to him. That English letter is not signed by the King. It indeed purports to be issued by him, with the consent of the Protector and Council, who do sign it; but it is certainly not signed by the King, nor issued with any of the usual formalities; while I observe that a very similar document called "The King's order for bringing in Popish Rituals," in 1549, contains at the beginning "By the kinge," and at the end "By

(1) Card. Doc. Ann. vol. i. p. 47.

(2) Law Rep. 2 A. & E. 116.

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the kinge, inscriptio hæc est:" Card. Doc. Ann., vol. i., pp. 85, 87. The injunctions are subscribed by the King. Sir John Dodgson treated this document of the 24th of February, 1547, as of no legal authority. Burnet speaks of it as "a letter." I do not recollect that in any of the cases in which this document has been discussed the force of a law was ever ascribed to it, or in any of the subsequent ecclesiastical instruments. It was referred to in the judgment of the Privy Council, but I think it is a misconception to suppose that they decided it to have legal authority. It was introduced as an historical fact, and they considered it in that light. Their Lordships say: "On the 21st of February (1), 1548, N.S., however another proclamation was issued, upon the authority of which *it is contended* that all images, including crosses, were to be taken down." They do not say the contention was founded in law, and they inadvertently call the document a proclamation, which it was not. They afterwards say: . . . "the intention was not to introduce within the prohibition articles of a description not before forbidden, but to do away with the distinction between images which had been and images which had not been abused:" *Westerton* v. *Liddell.* (2) That was undoubtedly the effect of the document, but I do not remember that the legal character of it was ever argued before them. They treat it, I think, as an historical fact. Whatever was its character, it could not in their opinion apply to crosses, the legality of which they were considering.

In the same year, but subsequently to this letter, Cranmer issued his Visitation Articles to the diocese of Canterbury, and among them the following:—

"Item. Whether they have not removed, taken away, and utterly extincted and destroyed in their churches, chapels, and houses all images, all shrines, coverings of shrines, all tables, candlesticks, trindles or rolls of wax, pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in walls, glass windows, or elsewhere:" Cardwell Doc. Ann., vol. i., p. 50.

(1) The date of the Council's letter is Feb. 21; of the issue of the *mandatum* by Cranmer Feb. 24; both are in the same instrument.

(2) Moore's Special Report, 168, 169.

This is a repetition almost verbatim of the 28th injunction, already referred to, except that it is extended to houses, and that the words "all images" are introduced; but it seems to me that they, like the pictures and the painted windows, must be in the category of monuments of feigned miracles, pilgrimages, and idolatrous superstition. The inquiry is whether all images of that kind had been removed.

It may be as well to observe here, that in construing the word "image" as used in the ancient and modern formularies of our Church I adopt generally the definition of Dr. Richardson: "Any thing made, framed, figured, or fashioned, graved, carved, or painted in imitation, likeness, or representation, a semblance or resemblance, picture or copy; a figure, statute, or effigy:" Richardson's Dict. tit. "Image."

It appears, with respect to this very cathedral of Exeter, that in the year 1321 there were payments made "*pictori pro imaginibus*," and for a plate whereon to grind his colours: Oliver's Hist. of Exeter Cathedral, p. 185. (1) I mean to say that the word "image" properly embraces the work of the painter as well as that of the sculptor, though it may occasionally be used in a more limited sense.

The statute 3 & 4 Edw. 6, c. 10, intituled "An Act for the abolishing and putting away of divers Books and Images," enacts (s. 1): "That all books called Antiphoners, Missals, Grailes, Processionals, Manuals, Legends, Pies, Portuasses, Primers in Latine or English, Couchers, Journals, Ordinals, or other books or writings whatsoever heretofore used for service of the church, written or printed in the English or Latine tongue, other than such as are or shall be set forth by the King's Majesty, shall be by authority of this present Act clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm, or elsewhere within any the King's dominions."

Sect. 2 enacts: "That if any person or persons, of what estate, degree, or condition soever he, she, or they be, body politick or corporate, that now have or hereafter shall have in his, her, or their custody, any the books or writings of the sorts aforesaid, or any

(1) Lives of the Bishops of Exeter, and a History of the Cathedral, by George Oliver, D.D., Exeter, 1861.

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images of stone, timber, alabaster, or earth, graven, carved, or *painted*, which heretofore have been taken out of any church or chapel, *or yet stand in any church or chapel*, and do not before the last day of June next ensuing deface and destroy, or cause to be defaced and destroyed, the *same images* and every of them, and deliver or cause to be delivered all and every the same books to the mayor, bailiff, constable, or churchwardens of the town where such books then shall be, to be by them delivered over openly within three months next following after the said delivery, to the archbishop, bishop, chancellor, or commissary of the same diocese, to the intent the said archbishop, bishop, chancellor, or commissary and every of them, cause them immediately either to be openly burnt or otherwise defaced and destroyed; shall for every such book or books willingly retained in his, her, or their hands or custody, within this realm, or elsewhere within any the King's dominions, and not delivered as is aforesaid, after the said last day of June, and be thereof lawfully convict, forfeit and lose to the King our sovereign lord, for the first offence xx.*s.* and for the second offence shall forfeit and lose (being thereof lawfully convict) iv.*li.* and for the third offence shall suffer imprisonment at the King's will."

Sect. 6 provides: "That this Act, or anything therein contained, shall not extend to any image or picture set or graven upon any tomb in any church, chapel, or churchyard, only for a monument of any king, prince, nobleman, or other dead person, which hath not been commonly reputed and taken for a saint, but that such pictures and images may stand and continue in the like manner and form as if this Act had never been had nor made; anything in this Act to the contrary in any wise notwithstanding."

This statute was repealed by 1st Mar. st. 2, c. 2, which statute is repealed by 1 Jac. 1, c. 25, s. 48.

To me the construction of this extraordinary statute is by no means plain.

It should be remarked, in the first place, that there is a letter of Cranmer to the Archdeacon of Canterbury, in 1549, in which he recites that he has received letters missive, signed by the King, from the King in Council, stating that the Book of Common Prayer, being commanded to be used by all persons in the realm, never-

theless "dyvers unquyette and evill disposed persons sithence the apprehension of the Duke of Sommersett, have noysed and bruted abrode that they sholde have agayne their old Lattenne service, their conjured bredde and water, with such like vayne and superstitiouse ceremonies, as thoughe the settinge forthe of the saide boke had been th'onlie acte of the saide duke; we therefore . . . to put away all such vayne expectation, . . . have thought goode . . . to commaunde," &c., "all antiphoners" &c.,—mentioning the same books as are in the statute—to be delivered up. (1) This order is dated the 25th of December, "the third yeare of our reigne," but it was not issued till the 14th of February, 1549. The statute appears to have been passed on the 1st of February. The order says nothing about images, and is obviously intended to prevent the restoration of the Latin service by the destruction of the Latin office books in every part of the kingdom. The statute mentions both books and images, graven, carved, or painted, including therefore all pictures; but what does it direct with respect to them? That those who have in their custody any such images, which have heretofore been taken out of, or yet stand in any church, shall deface and destroy them, but shall deliver up the books to certain authorities. There is a penalty for not destroying the books, but none for not destroying the images. The object would seem to be to prevent the restoration to the church, at that time, of the same images which had been abused by worship, and which had been, or ought to have been, removed.

The Privy Council, in *Westerton* v. *Liddell* (2), said of the statute: "No doubt, however, it implies that to retain them is illegal, but it relates, in their Lordships' opinion, to the destruction of images already ordered to be removed, but which either had not been removed, or, having been so, were still retained for private veneration and worship;" . . .

But I doubt very much whether this Act ought to be construed to prohibit the erection of all images, for the future, in all churches, a question not discussed before the Privy Council. There are no express words to this effect. I incline to the opinion that it had a temporary purpose in view, namely, to prevent the restoration of the

(1) Card. Doc. Ann. vol. i. p. 85; Perry, Church Ornaments, pp. 56-61.
(2) Moore's Special Report, p. 171.

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identical images to churches which had been, or ought to have been, taken out of them. It was deemed, as the 35th Article deems the Homily on the Peril of Idolatry, "necessary for these times." I do not think this Act was ever referred to in the ecclesiastical documents of Queen Elizabeth's reign. I have said that it was repealed by Mary, and it was restored by James I. by the repeal of Mary's Act. But surely it is reasonable to expect that if it contained universal and perpetual prohibitions of images and books, some reference would have been made to it in the reign of Elizabeth; more especially when it is remembered that the Homily "against the Peril of Idolatry," in the second book, published by authority in 1562, referred to in the 35th of the Thirty-nine Articles, and which is, in fact, a fervid controversial sermon against the use as well as the abuse of images, should not, unless I have overlooked it, make any reference to the fact that the statute had abolished all images in 1549, and, as it is contended, the Order in Council of 1547.

The letter of Bishop Sandys to Peter Martyr, dated April 1, 1560, and part of which is referred to by the learned assessor, leads me, on a study of the whole, to a conclusion different from that which he arrived at. Bishop Sandys writes:—

"We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the church, that the image of Christ crucified, together with those of the Virgin Mary and St. John, should be placed as heretofore in some conspicuous part of the church, where they might more readily be seen by all the people. Some of us bishops thought far otherwise, and more especially as all images of every kind were, at our last visitation, not only taken down, but also burnt, and that too by public authority; and because the ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others. As to myself, because I was rather vehement in this matter, and could by no means consent that an occasion of stumbling should be afforded to the Church of Christ, I was very near being deposed from my office, and incurring the displeasure of the Queen. But God, in whose hand are the hearts of Kings, gave us tranquillity instead of a tempest, and delivered the Church of England from

stumbling blocks of this kind." — Zurich Letters, first series, edition edited by the Parker Society, 1842, pp. 73–74, No. 71. There is no reference in this letter to the statute of Edward VI. or the letter of Cranmer.

By this construction of the statute at least the most monstrous consequences are avoided. Can it really be the law that any person now possessing, in his private house, or any body, politic or corporate, possessing in their library any one of these books, is liable to these penalties; not only all Her Majesty's Roman Catholic subjects, but all persons, of whatever religion they may be, who have a collection of books of devotion in their private houses? Is every picture, painted on canvas or glass, or carved in stone, for ever forbidden to the Church of England? I hope I am not wrong in having recourse to a construction of the statute which avoids these consequences.

In Queen Elizabeth's injunctions "concerning both the clergy and laity of this realm," issued in 1559, the first year of her reign, are the following passages:—

"Item, that they, the parsons above rehearsed, shall preach in their churches and every other cure they have, one sermon every month of the year at the least, wherein they shall purely and sincerely declare the word of God, and in the same exhort their hearers to the works of faith, as mercy and charity, specially prescribed and commanded in scripture; and that the works devised by man's fantasies, besides scripture (as wandering of pilgrimages, setting up of candles, praying upon beads, or such like superstition), have not only no promise of reward of scripture for doing of them, but contrariwise great threatenings and maledictions of God, for that they be things tending to idolatry and superstition, which of all other offences God Almighty doth most detest and abhor, for that the same diminish most his honour and glory. (1)

"Also, that they shall take away, utterly extinct, and destroy all shrines, covering of shrines, all tables, candlesticks, trindalls, and rolls of wax, *pictures, paintings,* and *all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in walls, glass windows, or*

(1) Card. Doc. Ann. vol. i. pp. 212, 213.

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elsewhere within their churches and houses." And in Injunction 25 men are exhorted not to bestow their substance upon "*decking of images*" and "other like blind devotions." (1)

In 1551, Burnet thinks, previously to the last injunctions, certain bishops and divines addressed the Queen against the use of images, citing passages in Deuteronomy, St. John, Tertullian, and other writers. In 1560 Bishop Jewell put out his famous challenge to the Papists, defying them to prove, inter alia, "that images were then set up in the churches" (that is, in the primitive churches) "*to the intent the people might worship them,*" using almost the words of St. Stephen, already adverted to, but very remarkable words to have been used in 1560, shewing pretty clearly that he who was supposed to be the writer of the homily on the peril of idolatry did not object on principle to all images in churches, but to images set up to be worshipped.

About the same time the Queen put out a "proclamation against defacers of monuments in churches."

"Elizabeth.—The Queen's Majesty understanding that by means of sundry people, partly ignorant, partly malicious or covetous, there hath been of late years spoiled and broken certain ancient monuments, some of metal, some of stone, which were erected up as well in churches as in other public places within this realm, only to shew a memory to the posterity of the persons there buried, or that had been benefactors to the buildings or dotations of the same churches or public places, and not to nourish any kind of superstition; by which means not only the churches and places remain at this present day spoiled, broken, and ruinated, to the offence of all noble and gentle hearts, and the extinguishing of the honourable and good memory of sundry virtuous and noble persons deceased; but also the true understanding of divers persons in this realm (who have descended of the blood of the same persons deceased) is thereby so darkened, as the true course of their inheritance may be hereafter interrupted, contrary to justice; besides many other offences that hereof do ensue, to the slander of such as either gave or *had charge in times past, only to deface monuments of idolatry and false feigned images* in churches and abbeys; and therefore, although it be very hard to recover things broken

(1) Card. Doc. Ann. vol. i. pp. 221, 222.

and spoiled, yet both to provide that no such barbarous disorder be hereafter used, and to repair as much of the said monuments as conveniently may be, Her Majesty chargeth and commandeth all manner of persons hereafter to forbear the breaking or defacing of any parcel of any monument, or tomb, or grave, or other inscription and memory of any person deceased, being in any manner of place; or to break any image of kings, princes, or noble estates of this realm, or of any other that have been in times past erected and set up for the only memory of them to their posterity, in common churches, and not for any religious honour, or to break down and deface *any image in glass windows* in any church without consent of the ordinary, upon pain that whosoever shall herein be found to offend, to be committed to the next gaol . . ." (1)

These orders of the Queen relate to false feigned images; that is, I suppose, images of false saints or false miracles.

The formulary of the Church most relied upon by the respondent was one of the homilies published in this reign. I think their authority has been much overstated. They are referred to in the 46th, 49th, and 80th of our canons; and the 35th of our Articles ("Of the Homilies") says:—

"The second book of Homilies, the several titles whereof we have joined under this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of Homilies, which were set forth in the time of Edward the Sixth; and therefore we judge them to be read in churches by the ministers, diligently and distinctly, that they may be understanded of the people."

Bishop Burnet, speaking of the Thirty-fifth Article, observes, I think with accuracy:—

"But by this approbation of the two books of Homilies, it is not meant that every passage of scripture or argument, that is made use of in them, is always convincing; . . . that we profess about them is only that they contain a godly and wholesome doctrine." (2)

Other writers of eminence have expressed the same opinion.

The Homily "against the Peril of Idolatry" was directed against the worship of images. It is impossible not to see that it is in

(1) Card. Doc. Ann. vol. i. p. 289.

(2) Exposition of the XXXIX. Articles, p. 375, London, 1699.

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reality a strong controversial tract, perhaps "necessary for *those* times," but by no means having the force of statutable authority for all its propositions for all times.

The Twenty-second of our Articles of Religion, says:—

"The Romish doctrine concerning purgatory, pardons, *worshipping and adoration, as well of images* as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of scripture, but rather repugnant to the Word of God."

That is undoubtedly the doctrine of our Church. This article, written in 1553, was adopted by authority in 1562. The article of the Council of Trent, which was dated December 4, 1563, "de invocatione, *veneratione*, et reliquiis sanctorum et sacris imaginibus (1)," though it condemns idolatry, orders due honour and worship (*venerationem*) to be paid to images of our Lord, the Blessed Virgin and the saints. The Church of England, holding her middle course, says this worshipping has no warranty in scripture, *immo verbo Dei contradicit* (according to the Latin version), but in no article does she say that the erecting of all images in churches is repugnant to the Word of God. On the contrary, Bishop Taylor observes, that "the wisdom of the Church was remarkable in the variety of sentences concerning the permission of images;" that "first, when they were blended in the dangers

(1) ". . . Imagines porro Christi, deiparæ Virginis, et aliorum sanctorum, in templis præsertim habendas, et retinendas, eisque *debitum honorem, et veneration*em impertiendam; non quod credatur inesse aliqua in iis divinitas, vel virtus, propter quam sint colendæ; vel quod ab eis sit aliquid petendum; vel quod fiducia in imaginibus sit figenda; veluti olim fiebat a gentibus, quæ in idolis spem suam collocabant; sed quoniam honos, qui eis exhibetur: refertur ad prototypa, quæ illæ repræsentant; ita ut per *imagines*, quas osculamur, et coram quibus caput aperimus, et procumbimus, Christum adoremus; et sanctos, quorum illæ similitudinem gerunt, veneramur. Id quod conciliorum, præsertim vero secundæ Nicænæ synodi decretis contra imaginum oppugnatores est sancitum.

"Illud vero diligenter doceant episcopi, per historias mysteriorum nostræ redemptionis, picturis, vel aliis similitudinibus expressas, erudiri, et confirmari populum in articulis fidei commemorandis et assidue recolendis; tum vero ex omnibus sacris imaginibus magnum fructum percipi, non solum quia admonetur populus beneficiorum et munerum," etc.—"De Invocatione, veneratione, et reliquiis sanctorum, et sacris imaginibus."—Canones et decreta sacrosancti . . . . Concilii Tridentini, . . . Opera et Studio Judoci Le Plat, Sessio xxv. p. 280, Antwerp, 1779.

and impure mixtures of Gentilism, and men were newly recovered from the snare, and had the reliques of a long custom to superstitions and false worshippings, they endured no images, but merely civil: but that as the danger ceased, and Christianity prevailed, they found that pictures had a natural use of good concernment to move less knowing people, by the representment and declaration of a story; and then they, knowing themselves permitted to the liberties of Christianity, and the restraints of nature and reason, and not being still weak under prejudice and childish dangers, but fortified by the excellency of a wise religion, took them into lawful uses." . . . Soon afterwards, he uses these remarkable expressions: ". . . they transcribed a history, . . . into a table, by figures making more lasting impressions than by words and sentences. While the Church stood within these limits, she had natural reason for her warrant, and the custom of several countries, and no precept of Christ to countermand it:" see Bishop Taylor's 10th Discourse on the Decalogue. (1)

These wise observations lead me to the consideration of an argument put forward by the appellants, which deserves especial notice.

It is to this effect, that assuming for the sake of argument the letter of Cranmer to be law, and the statute of Edward not merely to prohibit the replacing or retaining of particular images in churches at a particular period, but to contain a general enactment rendering illegal for the future images in all churches; nevertheless even on this assumption the present structure would not fall under the edge of these prohibitions, inasmuch as it is not in the sense of them an image *or* a series of images. The images contemplated in these prohibitions were detached separate images, which, if immoveable, might be kissed, decked with robes and jewels, worshipped; if moveable, carried in procession. These are the class of images of which Barrow speaks in his "Exposition of the Decalogue" on the second commandment. He censures, "affording to them the same expressions of reverence and respect, that we do or can present unto God himself, with great solemnity dedicating such images to them with huge care and cost, decking them, with great semblance of devotion, saluting them, and casting

(1) Bishop Taylor's Works, Heber's ed. vol. iii. p. 15.

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themselves down before them; carrying them in procession, exposing them to the people, and making long pilgrimages to them." (1)

But this reredos contains an historical emblematical representation of certain scenes in the history of our redemption, pictures in stone bassi-relievi, not of detached figures but of a particular story. Let me consider this argument; and first, I must express my decided opinion that whether the structure be legal or not, it is in no way distinguishable, having regard either to the principle or to the letter of the prohibitions, from paintings on canvas, or on the wall, or on the windows.

Quite consistently the Homily against the Peril of Idolatry commends Epiphanius, who "rejected not only carved, graven, and molten images, but also painted images out of Christ's church" (2), and the bishops who would not allow paintings on cloths or on walls.

It was mainly on this ground that the painted window in St. Margaret's Church was vehemently though unsuccessfully opposed.

The substance of the articles against the churchwardens in that case was, "that they had caused to be set up, in defiance of the laws and canons ecclesiastical, a painted glass in the eastern window, over the communion table, whereon is represented by delineation and colours one or more superstitious picture or pictures, and more particularly the painted image of Christ upon the cross." (3)

I do not think that the carved delineations on this reredos are liable to the abuses the existence of which caused the orders for the removal of images; they are not liable to have candles burnt before them; to be decked with jewels and precious raiment, or to be kissed or worshipped, or treated as workers of false and feigned miracles; I do not think that according to any reasonable probability this stone screen presents any "peril of idolatry" to the frequenters of the church.

(1) Barrow, An Exposition of the Decalogue, II. Commandment. (Works of Isaac Barrow, D.D., vol. vi. p. 496, ed. 1830; vol. i. p. 518, ed. 1687.)

(2) The second part of the Homily against Peril of Idolatry, at p. 173 of the Oxford edition (1840).

(3) Wilson's Ornaments of Churches (1761), p. xiii. (Preface).

I am fortified in this opinion by considerable authority. In the Homily against the Peril of Idolatry, I find it stated that the "Bishop of Nola caused the walls of the temple to be painted with stories taken out of the Old Testament, that the people beholding and considering those pictures might the better abstain from too much surfeiting and riot." . . . . And these" (says the writer) "were the first paintings in churches that were notable of antiquity. And so by this example came in painting, and afterward images of timber and stone, and other matter, into the churches of Christians. Now, if ye well consider this beginning, men are not so ready to worship a picture on a wall, or in a window, as an embossed and gilt image, set with pearl and stone. And a process of a story painted with the gestures and actions of many persons, and commonly the sum of the story written withal, hath another use in it than one dumb idol or image standing by itself. But from learning by painted stories it came by little and little to idolatry." (1)

Calvin, in one of his chapters of his Institutes (2) devoted to the question of pictures of God, and of images generally, after severe blame of the former, and of all worship of images, says:—"Neque tamen ea superstitione teneor, ut nullas prorsus imagines ferendas censeam. Sed quia sculptura et pictura Dei dona sunt, purum et legitimum utriusque *usum* requiro: ne quæ Dominus in suam gloriam, et bonum nostrum nobis contulit, eo non tantum *polluantur* præpostero abusu, sed in nostram quoque perniciem convertantur. *Deum effingi visibili specie* nefas esse putamus, quia id vetuit ipse, et fieri sine aliqua gloria ejus deformatione non potest . . . ." Then he says, God is not to be worshipped in the image nor the image as God; and he continues: "Restat igitur ut ea sola pingantur ac sculpantur quorum sint capaces oculi: *Dei* majestas quæ oculorum sensu longe superior est, ne indecoris spectris corrumpatur. In eo genere partim sunt historiæ ac *res gestæ*, partim *imagines* ac formæ corporum sine ullâ rerum gestarum notatione. *Priores* usum in docendo vel admonendo aliquem habent: *secundæ*,

(1) The second part of the Homily against Peril of Idolatry, at p. 192 of the Oxford edition (1840).

(2) Calvin, Institutio Christianæ Religionis, lib. i. cap. xi. s. 12, dedicated by Calvin to Francis the First, 1536, A.D. (ed. Tholuck, vol. i. p. 77, Berol, 1834).

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quid præter oblectationem afferre possunt non video. Et tamen constat tales fuisse omnes propemodum imagines quæ hactenus in templis prostiterunt." . . . He proceeds to point out the folly of these, and the frequently indecent licence of their execution, and he adds, . . . "etiam si nihil vitii inesset, nihil tamen habere ad docendum momenti." And commenting on Psalm cxv. 6—8, he says:—"Notandum autem non minus similitudinem vetari quam sculptile: quo inepta Græcorum cautio refutatur. Belle enim de functos se putant si Deum non sculpant, dum in picturis licentiosius quam ullæ aliæ gentes lasciviunt. Atqui Dominus non à statuario modo sibi erigi effigiem sed a quolibet artifice effingi prohibit:" . . . (1)

In Denmark, where the Evangelical Lutheran Church is established as the church of the state, there is the Vor Frue Kirche, Our Lady's Church, the principal church in Copenhagen. In the pediment is sculptured a group of St. John preaching in the Wilderness; in the vestibule, a frieze in which is represented the Entry into Jerusalem; in the nave the Twelve Apostles; over the altar our Lord is sculptured, and in the chancel the Baptismal Angel, and there are various bassi-relievi of scriptural subjects.

There was a solemn inauguration of these figures—the glory of Thorwaldsen's genius—in the church in 1839.

V. I have now to consider the effect of the judgment delivered in the Court of Arches in the year 1684.

It appears that shortly before that time certain parishioners applied for a faculty to put up in painting, as I understand it, pictures of the thirteen Apostles—"the images of thirteen Apostles, St. Paul being one" . . . . Allen's History of the County of Lincoln, vol. i. p. 335, note—in the parish church of Moulton in the diocese and county of Lincoln, and I think over the Holy Communion Table, but certainly at the east end. The surrogate of the chancellor of Lincoln granted the faculty, but the chancellor

(1) "Ex dictis patet imperitia hæreticorum nostrorum, dum asserunt, omnes omnino imagines hic jure naturæ vetari. Unde Calvinus videns quam absonè hoc dicatur, licet tacitè omnes imagines carpat; tamen asseverat, non omnes, sed Dei tantum imaginem hic vetari." (Cornelius a Lapide, Commentar. in Deut. ch. v. verse 8, at p. 739 of the second edition published at Venice, 1717.) Calvin, Institutio Christianæ Religionis, lib. 1, c. xi.; s. 4.

revoked it, and the bishop, Dr. Thomas Barlow, appears also to have refused his consent. An appeal was prosecuted to the Court of Arches.

As to the bishop, I learn from Wood that "He was esteemed by those who knew him well to have been a thorough-paced Calvinist, though some of his writings shew him to have been a great scholar, profoundly learned both in divinity and the civil and canon law:" Wood's Athenæ Oxonienses, vol. iv. 335, ed. Bliss.

He wrote various tracts on "Cases of Conscience," and among them "*A breviate of the case concerning setting up images in the parish church of Moulton.*" (1) The tract was published contrary to his expressed testamentary wishes, after his death; and the bookseller writes a preface which shews that he clearly misunderstood the proceedings in the Arches; his error appears, as is often the case, to have been perpetuated by copying. It appears again in a paper called the *Old Whig*, in 1736, and is thence transcribed into a history of the county of Lincoln. (2) Unfortunately at the time of the trial there were no published ecclesiastical reports; but I have been supplied from the records of the Arches Court with a copy of the libel of appeal, and of the sentence of the judge. The libel appears to contain, as probably was the case in those days, a summary of the pleadings on both sides in the Court below; the case was entitled *Cocke and Others* v. *Tallents.* (3)

Tallents, who was a clergyman, and also a parishioner, objected to the grant of a faculty "pro erectione sive pictione effigierum apostolorum in ecclesiâ," and alleged "that by the book of Homilies, and more especially by the Homilies against the Peril of Idolatry, and also by the injunctions of King Edward VI. and Queen Elizabeth, the painting and setting up the Apostles' effigies in any church or chapel is very dangerous in regard they are superstitious, and do tend to idolatry as by the said homilies and injunctions (to which he refers himself), it doth at large appear. Wherefore he prayed the faculty obtained from the said court might be pro-

(1) See "Several miscellaneous and weighty Cases of Conscience learnedly and judiciously resolved by the Right Reverend Father in God, Dr. Thomas Barlow, late Lord Bishop of Lincoln," London, 1692.

(2) See Allen's History of the County of Lincoln, vol. i. p. 335, note.

(3) Not reported.

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nounced null and void, insomuch as doth relate to the setting up of the said effigies."

It was alleged, on the other hand, by the parishioners, "that the setting up of those pictures was out of an honest and pious intention to beautify the said church, and a work commendable and not to be discountenanced, being not at all repugnant to the injunctions of King Edward VI., Queen Elizabeth, or the Homilies of the Church of England, nor monuments of feigned miracles, nor do any ways tend to superstition."—The statute of Edward VI. is not referred to.— . . . "that the setting up of the said effigies was no ways offensive to them or any of them, saving only one Thomas Scarlett, who did object against the same as superstitious and idolatrous. Licetque insuper allegaverint that by the opinion and judgment of all orthodox divines the painting of the effigies of the blest Apostles in any church or chapel is not idolatrous or superstitious, but do serve only for ornament and to put people in remembrance of the holy lives and conversations of those they do represent; and that by the injunctions of Edward VI. and the ecclesiastical laws of this land, it is required that all persons and vicars, and other ecclesiastical persons, shall admonish their parishioners that the same do serve for no other end and purpose, and therefore, since there is no apparent danger of superstition, the effigies of the holy Apostles in the parish church of Moulton aforesaid may and ought to continue as they are now painted, otherwise it may be of dangerous consequence, since that under such pretended fears of superstition and idolatry most of the churches, chapels, colleges, and other pious and religious places in England may be in danger of being pulled down and demolished, and so in all probability the hatred of idolatry would usher in licentious sacrilege."

The case appears to have been formally heard before a very learned person, Sir Richard Lloyd, the then Dean of the Arches, and he pronounced in favour of the lawfulness of the images, granted the faculty, and condemned the opposing party in costs.

It is remarkable that the sentence is not only signed by Sir Richard Lloyd, but also by Sir Thomas Exton, who succeeded him as Dean of the Arches; by Dr. Pinfold, afterwards Advocate-

General; and by Sir Richard Raines, afterwards Judge of the Prerogative Court and of the Court of Admiralty. Whether those additional signatures were on account of the great importance of the case, as I suppose, or whether it was usual to obtain the approbation of other members of the College of Advocates at that time, I do not know.

I much regret that this sentence was not discovered in time to be brought to the notice of Sir Henry Keating. It is certainly entitled to the greatest respect at my hands, and must be considered as an important precedent with reference to the case before me, from which it is only distinguishable by the facts (1) that the images appear to have been painted and not sculptured, (2) and to have been single detached figures, and not, as in the case before me, part of an historical scene, or, as the Homily terms it, "the process of a story."

VI. Lastly, I come to Mr. Phillpotts' final argument as to the discretion which ought to be exercised. I agree with him that as to questions of this kind the Ecclesiastical Court has a discretion to exercise. Ornaments and structures which it may be proper, all the circumstances considered, to allow in some cases, it may be improper to allow in others. Much of the decoration of a cathedral may be unsuitable in a parish church. I am urged to exercise this judicial discretion adversely to the erection of the reredos in this case on the ground of the tendency to adopt the usages of Rome said to be now prevalent, and on the ground that this structure is an approach to such uses. If there be such a tendency, I deeply lament it: but I doubt whether the tendency is to be counteracted in the way proposed. I think there is great danger of doing unintentionally the work of the Church of Rome by denying to the Church of England the innocent aid which the arts of painting and sculpture, within due limits, minister to religion. If the use of all things abused by Rome were taken from our church, she would be very bare. "It must be confessed" (says our 30th canon) "that in process of time the sign of the cross was greatly abused in the Church of Rome, especially after that corruption of popery had once possessed it; but the abuse of a thing does not take away the use of it."

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"But concerning those our ceremonies," says Hooker, "which they reckon for most Popish, they are not able to avouch that any of them was otherwise instituted than unto good, yea, so used at the first. It followeth, then, that they all are such as having served to good purpose were afterwards converted into the contrary. And sith it is not so much as objected against us, that we retain together with them the evil wherewith they have been infected in the Church of Rome, I would demand who they are whom we scandalise, by using harmless things unto that good end to which they were first instituted?" (1)

The very learned and pious Dr. Donne says (Sermon xxix. Ad. Aulam):—"God, we see, was the first that made images, and he was the first that forebade them. He made them for imitation; he forbade them for adoration. For what a drowsiness, what a laziness, what a cowardliness of the soul is it to worship that which does but represent a better thing than itself. Worship belongs to the best. Know thou thy distance and thy period, how far to go and where to stop. Dishonour not God by an image in worshipping it, and yet benefit thyself in following it. There is no more danger out of a picture than out of a history, if thou intend no more in either than example."

Archbishop Tenison, before his promotion to Canterbury, wrote a treatise on idolatry, in which he says:—

"But for the images or pictures of the saints in their former estate on earth; if they be made with discretion; if they be the representations of such whose saintship no wise man calleth into question; if they be designed as their honourable memorials; they who are wise to sobriety do make use of them; and they are permitted in *Geneva* itself where remain in the quire of the church of St. Peter, the pictures of the twelve prophets one side, and on the other those of the twelve apostles, all in wood; also the pictures of the Virgin and St. Peter in one of the windows. And we give to such pictures that negative honour which they are worthy of. We value them beyond any *images* besides that of Christ: we help our memories by them; we forbear all signs of contempt towards them. But worship them we do not, so much

(1) Hooker's Works, vol. i., ch. xii. 5, p. 392, ed. 1836.

as with external positive signs: for if we uncover the head (1), we do it not to them, but at them, to the honour of God who hath made them so great instruments in the Christian Church, and to the subordinate praise of the saints themselves." (2)

Archbishop Wake, in that part of his answer to the Bishop of Meaux, which is called "An answer to the fourth article of Images and Reliques," s. 1, "Of the Benefit of Pictures and Images," (Gibson's Preservative against Popery, vol. iii. tit. ix. p. 217), observes:

"Were the *benefit* of *images* never so great, yet you know this is neither that which we dispute with you, nor for which they are set up in your churches. Your Trent synod expressly defines that *due veneration* is to be paid to them. Your catechism says that they are to be had not only for *instruction* but for *worship*. And this is the *point* in *controversy* betwixt us. We retain *pictures*, and sometimes even *images* too in our *churches* for *ornament*, and (if there be such uses to be made of them) for all the other *benefits* you have now been mentioning. Only we deny that any *service* is to be paid to them, or any *solemn prayers* to be made at their *consecration*, for any *divine virtues*, or indeed for any virtues at all, to proceed from them."

Lastly, Dean Milman has some observations on this modern use of sculpture and painting in churches, which appear to me wise and pertinent. (Milman, History of Latin Christianity, vol. ii. p. 152.) . . . "so in general," he remarks, "the ruder the art the more intense the superstition. The perfection of the fine arts leads rather to diminish than to promote such superstition. Not merely does the cultivation of mind required for their higher execution, as well as the admiration of them, imply an advanced state, but the idealism, which is their crowning excellence, in some degree unrealises them and creates a different and more exalted feeling. There is more direct idolatry paid to the rough and ill-shapen image, or the flat unrelieved and staring picture, the former actually clothed in gaudy and tinsel ornaments, the latter with the crown

(1) Vide ante, p. 16 (note), Council of Trent "caput aperimus."

(2) "Of idolatry: a discourse in which is endeavoured a declaration of its distinction from superstition; . . . . by Tho. Tenison, B.D., chaplain in ordinary to the Queen," ch. xii. pt. 2, p. 297, London, 1678.

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of gold leaf on the head, and real or artificial flowers in the hand—than to the noblest ideal statue, or the Holy Family, with all the magic of light and shade. They are not the fine paintings which work miracles, but the coarse and smoke-darkened boards, on which the dim outline of form is hardly to be traced. Thus it may be said, that it was the superstition which required the images, rather than the images which formed the superstition."

I do not think that in the cathedral of Exeter the reredos put up by the dean and chapter can be justly said, to borrow the words of our 30th canon, "to endamage the church of God, nor offend the minds of sober men," any more than the painting of the Crucifixion on the boss in the roof of the same cathedral directly over the choir, which appears in the drawings submitted to me, and which is, in truth, obnoxious to almost all the objections made against the reredos, though its removal has not yet been sought.

The prayer of the appellants is, that they may be dismissed from all further observance of justice in this case, and that the respondent may be condemned in costs.

It follows from what I have said that I would grant the first part of this prayer; as to the latter I hesitate.

Mr. Phillpotts, in the opening of his speech, pointed out to me that the petitioner, the chancellor of the diocese, had in a recent case (1) ordered a reredos, with certain figures, to be removed from Lynton Church, and that in his capacity as a prebendary, he felt it his duty to try the question of the lawfulness of such a structure in the cathedral, in order that there might not be allowed there what he had disallowed in a parish church; there ought to be the same law he thought for both. I am too imperfectly acquainted with that case to offer any opinion upon it; it may have been rightly decided with reference to the discretion of the ordinary to grant or withhold a faculty for such a structure in a parish church, but I think the case affords a reason why the chancellor of the diocese might desire that the present cause should be tried.

I should be glad to think that peace was about to be restored to this cathedral, and that the golden ecclesiastical maxim, which the learned Waterland prefixes to one of his best works, was about

(1) Not reported.

to prevail; "In necessariis unitas; in non necessariis libertas; in omnibus prudentia et charitas." I hope that the prayer for costs will be withdrawn.

Proctors for appellants: *Moore & Currey.*
Proctor for respondent: *Skipwith.*

The minute of the judgment of the Court, as entered in the registry, was in substance as follows:—

Aug. 6, 1874. "The judge having maturely deliberated by his interlocutory decree, having the force and effect of a definitive sentence in writing, pronounced for the appeal and complaint made and interposed on the part and behalf of the appellants in this cause and for his jurisdiction, and reversed the judgment of the Right Reverend Frederick Lord Bishop of Exeter, in so far as he as visitor and ordinary of the cathedral church of St. Peter in Exeter pronounced for his jurisdiction to order the removal of a reredos with certain images thereon lately set up in the said cathedral church, in substitution of the stone screen which had formed the east end of the choir of the said cathedral church with the Ten Commandments thereupon, and the said judge further pronounced for the lawfulness of the erection of the said reredos with the images thereon and reversed the judgment of the Court below, in so far as he the said bishop ordered and adjudged that the said reredos and images thereon be removed, that either a stone screen without images thereon be erected or the open ironwork then lately erected and then standing on each side of the reredos be continued so as to occupy its place, and that the Ten Commandments be set up on the east end of the choir of the said cathedral, in compliance with the terms of the canon, where the people may best see and read the same, and the said judge dismissed the appellants from all further observance of justice and made no order as to costs."

1875
Jan. 19.

THE JAMES ARMSTRONG. (6810, 6813, 6833, 6835, 6874.)

Salvage—Mistake in Value—Alteration of Decree.

Salvage services having been rendered to a ship laden with cargo, a salvage suit was instituted against ship, freight, and cargo. Separate appearances were entered on behalf of the owner of the ship and the owner of the cargo. The owner of the cargo filed an affidavit of value stating the value of the cargo, and the owner of the ship filed an affidavit of value stating the value of the ship and freight. At the hearing, the Court, taking these values as accurate, by its decree awarded to the salvors a certain sum as salvage. Some time afterwards, the owner of the cargo discovered that he had by mistake included in his valuation of the cargo the value of the freight, and that the freight was of more value than appeared by the affidavit of value filed on behalf of the owner of the ship, and he made application to the Court to reduce the value of the cargo, and to reduce the amount it had previously decreed as salvage. On the mistake being proved:—

Held, that the Court had power to correct the mistake and to make the necessary alterations in the decree.

Several salvage causes were instituted on behalf of the owners, master, and crew of the steamship *Queen of the Bay*, and on behalf of the owners, masters, and crews of certain pilot cutters and luggers, and on behalf of the owners and crews of certain boats, against the barque *James Armstrong*, her cargo and freight. The barque *James Armstrong* was discovered by some of the plaintiffs derelict drifting three or four miles from St. Mary's, Scilly. The plaintiffs brought the barque into St. Mary's, Scilly, and on the 19th of March, 1874, handed her over to the receiver of wreck for the port of Scilly. The barque when brought into St. Mary's was laden with a cargo of mahogany and logwood. Three of the causes were consolidated into one consolidated cause, and two of the causes were consolidated into another consolidated cause, and petitions were filed in each consolidated cause. An appearance was entered and an answer filed in each cause on behalf of the owner of the *James Armstrong*, and an affidavit of value was brought in by him. The affidavit, which was sworn on the 9th of May, 1874, contained the following statements:—

The said barque had on board a cargo of mahogany dye-woods and broken stowage, and I say that the value of the said cargo at the time aforesaid was the sum of 3000*l*., and no more.

The said barque was on a voyage from Truxillo to Waterford for orders,

whence she was ordered to London, and the freight payable on the carriage of the said cargo was to have been the sum of about 1500*l.*, but inasmuch as the sum of 500*l.* will have to be expended to convey the said cargo from Scilly, where it now lies, to London, before I can claim my freight, I say that the amount of freight to be earned by the said barque is the sum of 1000*l.*, and no more, assuming she has all her cargo.

On the 22nd of June, an appearance was entered in each consolidated cause on behalf of the owner of the cargo of the *James Armstrong*, and, on the 25th of June, the owner of the cargo filed an affidavit of value similar in terms to the affidavit filed on behalf of the owner of the *James Armstrong*. All the causes were afterwards consolidated into one cause, and the consolidated cause was heard on the 8th of July. At the hearing, the owner of the barque brought in a further affidavit of value, in which he stated that the value of the freight was not more than 512*l.*, and at the hearing the value of the ship and freight was taken to be 1000*l.* The judge pronounced the sum of 2000*l.* to be due to the plaintiffs for their salvage services, together with 400*l.* for the damage sustained by them in rendering the said services.

In November, 1874, the owner of the cargo gave notice that he intended to move the Court to reduce the value of the cargo from 3000*l.* to 1283*l.* 15*s.* 10*d.*, the net proceeds of the sale of the said cargo, and to reduce the salvage accordingly. An affidavit in support of the motion by the owner of the cargo, sworn on or about the 30th of November, 1874, was filed. The affidavit stated that the cargo was insured, and that the owner of the cargo, having given notice of abandonment to the underwriters, was, in the first instance, advised not to intervene in the salvage suits, and that accordingly he did not appear in the suits until the 22nd of June, when an arrangement was made with the underwriters, and on the 23rd of June an order was made that he should file an answer within three days. The affidavit then proceeded in substance as follows:—

The shipowner proceeded to Scilly, and arranged to discharge the cargo, and to forward it to London, the port of discharge, so as to earn his freight; and on or about the 18th of June, a portion of the cargo, consisting of about 145 tons, arrived in London. That cargo arrived in possession of the Marshal of the Admiralty Court, who continued to retain possession of it.

On the 25th day of June, 1874, I filed an affidavit of value, in which I stated, to the best of my knowledge and belief, that the cargo was of the value

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of 3000*l.* At that time I did not know in what condition the cargo was, or what in fact it would actually realise, inasmuch as I had no knowledge as to how much of the cargo was saved, or how much damaged, or how much forwarded.

On the 28th of June, further portions of the said cargo, consisting of about 160 tons, arrived in London.

On or about the 4th of August, the residue of the cargo which was salved arrived in London.

Having obtained possession of the cargo I forthwith put the same in the hands of my brokers for sale and realisation, who proceeded to measure it and prepare it for sale, and on the 13th and 17th of August last the cargo aforesaid was sold by auction by Messrs. George Shadbolt & Sons, of London.

I annex to this my affidavit a printed catalogue, containing the particulars of the cargo, and also copies of the account sales as rendered by Messrs. George Shadbolt & Sons, and the cargo at such sale realised, after deducting expenses, 2797*l.* 3*s.* 3*d.*, the best price obtainable.

The freight paid to the owner of the ship, and which freight was payable on the delivery of the goods in London, amounted to the sum of 1513*l.* 7*s.* 5*d.* The said sum of 1513*l.* 7*s.* 5*d.*, deducted from the said sum of 2797*l.* 3*s.* 3*d.*, leaves a balance of 1283*l.* 15*s.* 10*d.*, which I submit represents the true value of the cargo as salved.

On the 13th of October, 1874, I caused to be extracted the minute of decree for proceeding with the appeal against the award of this Court, but after consultation with the various underwriters, and others interested in the suit, the appeal was abandoned. The proctors for the plaintiffs thereupon brought in their costs for taxation, and such taxation was completed on the 4th day of November, 1874, and thereupon judgment in this suit was perfected.

When the costs were completed, I proceeded to have a statement made up by my average staters, in order to claim upon underwriters, and it was not until within the last few days that I have been advised by them, upon their going through the accounts, that the value of the cargo for the purposes of contribution in this suit, amounts to the sum of 1283*l.* 15*s.* 10*d.*

Dec. 1, 1874. *Butt, Q.C.*, and *G. Bruce*, moved, in pursuance of the notice of motion. The object of the application is to rectify a mistake made by the owner of the cargo, in consequence of which the Court has been led to award a larger sum to the plaintiffs than it otherwise would have awarded; in fact, the proportion of the sum awarded by the Court, which the owner of the cargo will be called upon to pay, is really greater than the amount realized by the sale of the cargo. The court will not allow a mistake to work manifest injustice when it can be remedied. The owner of the cargo only seeks to be placed in the same position as if the true value of the cargo had been brought to the notice of the Court at the hearing. *The Monarch* (1); *The Mark-*

(1) 1 W. Rob. 21.

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land (1), are authorities which shew that the Court has power to rectify its decrees.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *W. G. F. Phillimore*, for the plaintiffs, opposed the motion. The cause was heard in July, and it is too late now to alter the facts upon which the judgment of the court proceeded. Suppose the value of the vessel or her cargo had been understated at the hearing of the cause, the plaintiffs would not have been allowed to come now to the court to alter the decree upon the ground that they had since obtained evidence to prove that the former estimate of the value of the property was insufficient. If there was any doubt about the true value, the owner of the cargo should have obtained an appraisement. (2) The cases cited on the other side are not applicable; in both those cases the mistake was a mistake of the Court; in the present case, the owner of the cargo himself made the mistake. The question in the suit is, what was the value of the cargo at Scilly at the time it was brought there, not what it fetched months afterwards in London. They then proceeded to discuss the items of the accounts.

A. S. Lamb for the owners of the *James Armstrong*.

SIR ROBERT PHILLIMORE. I cannot decide this case on the materials now before me. I shall direct the registrar to inquire into and report upon the amount of freight payable to the owner of the vessel *James Armstrong*, and in respect of which he was liable to contribute to the salvage.

On the 26th of December, 1874, the assistant registrar drew up a report, the material portion of which was as follows:—

"I do most humbly report that I have carefully examined the papers and proceedings produced and filed in this cause, and having on the 8th of December instant heard what was urged by the proctors on all sides, I find that the whole freight payable under the charterparty amounted to the sum of 1768*l.* 17*s.* 3*d.*, of which 255*l.* 9*s.* 10*d.* was advanced at Honduras, leaving a balance of 1513*l.* 7*s.* 5*d.*, which was payable on the delivery of the cargo in London.

(1) Law Rep. 3 A. & E. 340.

(2) See *The Cargo ex Venus*, Law Rep. 1 A. & E. 50. 12 Jur. N.S. 379

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I further find that the expenses attending the transhipment of the said cargo, and the conveyance of it from Scilly to London, amounted to 700*l.* 7*s.*, which, deducted from the said sum of 1513*l.* 7*s.* 5*d.*, leaves a balance of 813*l.* 0*s.* 5*d.* net freight in London, but inasmuch as the salvage services were concluded at Scilly, in March, 1874, and great delay then ensued in arranging for the transhipment and conveyance of the said cargo to London, I am of opinion that the amount of freight in respect of which the owner of the said vessel is liable to contribute to the salvage awarded in this case may be fairly estimated at the sum of 1000*l.*

Jan. 19, 1875. The motion was renewed.

Butt, Q.C., and *G. Bruce*, for the owner of the cargo. There can no longer be any dispute about the figures. In order to ascertain the value of the cargo the freight must be deducted, because the owner of the cargo could not get the cargo until he paid the freight.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *W. G. F. Phillimore*, for the plaintiffs. We admit the principle that the value upon which the cargo ought to pay must be reckoned exclusive of the freight; but we contend the Court has no power to re-open the case or alter its decree.

E. C. Clarkson, for the owner of the *James Armstrong*.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. The question raised to-day for the second time before me is embarrassing and peculiar. Several salvage suits having been instituted against the *James Armstrong*, her freight and cargo, were consolidated and came on for hearing on the 8th of July last. At the hearing the Court decreed to the salvors the sum of 2000*l.* for the salvage services rendered to the *James Armstrong* and her cargo, together with 400*l.* for the damage sustained by them in rendering the said services, and ordered the defendants to pay the costs. From this decree the defendants appealed, but subsequently the appeal was abandoned. The owner of the cargo, on the 1st of December last, made an application to the Court to reduce its award, and produced new evidence as to the value of the cargo. When the motion was made I thought

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it right that I should refer the question of the value of the freight to the registrar. The registrar has made his report, and he estimates the value of the freight at 1000*l.* It now appears that when the owner of the cargo stated the value of the cargo at 3000*l.* he was speaking of the cargo inclusive of freight. It has been contended that the whole of the freight received on the delivery of the cargo in London should be deducted from the proceeds of the cargo in order to ascertain the value of the cargo for the purpose of the salvage suit. But I am not satisfied that that is so; and I think the registrar has arrived at a proper conclusion. The salvage services were completed at Scilly, and for the purposes of this case it is necessary to consider what was the value of the freight and of the cargo at Scilly. In estimating the value of the freight the registrar no doubt had in his mind the principle laid down by Dr. Lushington in *The Norma.* (1) I am not satisfied that it would be fair to take the sale in London six months after the services were completed as a test of the value of the cargo for the purposes of this case; and I think I ought not to alter the value of the cargo as sworn to in the affidavit of value, except by deducting therefrom the value of the freight. Having regard to all the facts, I think I shall meet the justice of the case by holding that the total value of the property liable to pay salvage is less by 500*l.* than the values on which the Court based its award. The result of this reduction will be that the sum of 3500*l.* must be taken as the value of the property salved; this value being made up as follows:—The value of the ship standing at about 500*l.*, the value stated at the hearing; the value of the freight being increased from 512*l.* to 1000*l.*, as found by the registrar; and the value of the cargo being reduced from 3000*l.* to 2000*l.* by deducting from the 3000*l.* the 1000*l.*, the value of the freight. The amount of the sum already awarded as reward for the services rendered must in consequence be reduced by one-eighth, that is, from 2000*l.* to 1750*l.* To this amount must be added 400*l.* for the damage sustained by the salvors, making the total amount to be received by the plaintiffs 2150*l.* Of this sum the owners of the ship must contribute upon a value of 1500*l.*, and the owners of cargo upon a value of 2000*l.*, making

(1) Lush. 124.

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the share to be paid by the owners of the ship 922*l.*, and by the owners of the cargo 1228*l.* The owners of the cargo must pay all the costs.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for owner of ship: *Hollams, Son, & Coward.*
Solicitors for owner of cargo: *Parker, Watney, & Clarke.*

1874
Nov. 21.

THE DANNEBROG. (6997.)

Damage to Cargo—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6—*Breach of Duty or Breach of Contract.*

A ship was chartered to proceed to a port abroad and there take in cargo. The charterers instituted a suit against the ship, and in their petition alleged inter alia that the master of the ship improperly refused to proceed with the ship to the agreed port of loading and proceeded with her to another port:—

Held, that such conduct on the part of the master did not constitute a breach of duty or breach of contract within the meaning of the 6th section of the Admiralty Court Act, 1861, and that the Court had no jurisdiction to entertain any claim for damages arising therefrom.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of the owners of cargo lately laden on board the foreign barque *Dannebrog* against the *Dannebrog* and against her owners intervening as defendants.

The first article of the petition stated that by a charterparty made between the master of the said barque and the plaintiffs it had been agreed that the vessel should proceed to Moser's River, Nova Scotia, or so near thereto as she might safely get, and there load a cargo which the plaintiffs bound themselves to ship, and being so loaded should therewith proceed to an English port within certain limits as ordered.

The second and third articles of the petition were in substance as follows:—

2. In accordance with the said charterparty the plaintiffs provided a cargo ready to be shipped on board the *Dannebrog* at the usual place in Moser's River, and it became and was the duty of the master of the *Dannebrog* to proceed with the said vessel to Moser's River, and to the usual loading place there, and to load

the said cargo, but although all conditions were fulfilled, and all times elapsed, and all things happened necessary to entitle the plaintiffs to have the said charterparty performed, and to have the said vessel proceed to Moser's River, and to the usual loading place there, and to load the said cargo, and although she could have safely proceeded to Moser's River, and to the said usual loading place, and could have there loaded the said cargo always afloat, the said master proceeded with the said vessel to Mecam Tank Bay, which is a place not in, but short of, Moser's River, and there anchored the said vessel, and neglected and refused to proceed with the said vessel to Moser's River, and to the said usual loading place.

3. The agent of the plaintiffs thereupon under protest loaded the said vessel in Mecam Tank Bay with a full and complete cargo, but by reason of the said refusal the plaintiffs were put to expense which they would not have incurred if the said vessel had proceeded to Moser's River and there loaded her cargo, and by reason of such refusal, and of the said vessel having been driven ashore, owing to Mecam Tank Bay being an exposed anchorage, a much longer time was consumed in loading the said cargo than would have been consumed in loading the same had the said vessel proceeded to Moser's River and there loaded her said cargo in accordance with the said charterparty, and the said vessel did not sail on and complete her voyage and deliver her cargo so soon as she would have done had she proceeded to Moser's River.

The petition then proceeded to aver in substance, as follows: When the cargo had been loaded, bills of lading were signed by the master. The bills of lading stated that the goods were to be delivered at the port of discharge to the plaintiffs on payment of freight, &c. The vessel sailed with the said cargo on board and arrived at Gloucester, her port of discharge. All conditions were performed to entitle the plaintiffs to have the said cargo delivered to them, yet the master of the said vessel refused to deliver a large portion of the said cargo in accordance with the bills of lading. The plaintiffs were at the time of the said refusal of the master to go to Moser's River, and thenceforth down to and at the time when they became entitled as aforesaid to have the said cargo delivered at Gloucester, the owners thereof, within the meaning

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of s. 6 of the Admiralty Court Act, 1861. By reason of the breaches of duty and breaches of contract, the plaintiff sustained damage.

Nov. 21. *Cohen, Q.C.*, and *W. G. F. Phillimore*, on behalf of the defendants, moved the judge to reject the second and third articles of the petition, and to direct the amendment of other articles in the petition, on the ground that the Court had not jurisdiction to try the claim made by the second and third articles. The breach of duty or breach of contract referred to in the articles objected to does not constitute a breach of duty or breach of contract within the meaning of the words of the 6th section of the Admiralty Court Act, 1861. The breach of duty or breach of contract referred to in the statute is a breach of duty or breach of contract relating to the carriage of goods. *The Kasan* (1); *Simpson* v. *Blues* (2); *The Cargo ex Argos, The Hewsons* (3); *The St. Cloud* (4); *The Pieve Superiore* (5); *The Patria* (6); *The San Roman.* (7)

C. Russell, Q.C., and *E. C. Clarkson*, on behalf of the plaintiffs. No doubt the carriage of the goods into a port in England or Wales is a condition precedent to the exercise of the jurisdiction conferred upon this Court by the 6th section of the Admiralty Court Act, 1861; but when once this condition has been satisfied there is no reason why the Court should not exercise jurisdiction over all breaches of contract relating to the carriage of the goods. The breach in question related to the carriage of goods, and it cannot be supposed that the legislature intended to give this Court jurisdiction only over those breaches of contract which are committed after the goods are on board a ship. In this suit there is a claim for damages for short delivery, and that is a claim which the Court undoubtedly has jurisdiction to entertain; and there is no good reason why this Court should not determine the whole dispute between the parties with reference to all the breaches of the charterparty complained of: *The Dantzig.* (8)

(1) Br. & L. 1; 32 L. J. (P. M. & A.) 97.
(2) Law Rep. 7. C P. 290.
(3) Law Rep. 5 P. C. 134.
(4) Br. & L. 4.
(5) Law Rep. 5 P. C. 482.
(6) Law Rep. 3 A. & E. 436.
(7) Law Rep. 3 A. & E. 583.
(8) Br. & L. 102; 32 L. J. (P. M. & A.) 164.

Cohen, Q.C., in reply, cited *The Cargo ex Galam.* (1)

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SIR ROBERT PHILLIMORE. This motion raises a very difficult point of law. The second and third articles of the petition state in substance as a breach of contract that the ship did not proceed to a particular place called Moser's River, according to the terms of the charterparty, and it is contended that under s. 6 of the Admiralty Court Act, 1861, I have authority to entertain the claim made by the plaintiffs in respect of this breach of contract. Now the 6th section of the Admiralty Court Act, 1861, enacts as follows:— "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." It cannot be denied that some limitation, some reasonable limitation, must be placed on the meaning of the words "breach of contract." It cannot be that the legislature intended the Court to exercise jurisdiction over every breach of contract on the part of the owners, master, or crew of a ship. The Court has now to decide whether the provisions of the section include a case in which the breach of contract was committed before the goods were put on board. I have already said I feel great difficulty in arriving at a satisfactory decision upon the construction of the statute, but I do not think that the statute can relate to such a case as that now before the Court. I therefore order the second and third articles to be struck out of the petition, and the remainder of the petition to be reformed accordingly.

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Co.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

(1) Br. & L. 167.

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Jan. 23.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY COMBE *v.* EDWARDS.

Pleading—Particularity required as to Dates of Offences charged—Responsive Plea containing Irrelevant Matter.

Certain articles exhibited in a suit instituted by letters of request against the vicar of a parish, charged that the vicar, when officiating in the parish church and during divine service, on divers specified days, and on divers other days and times within two years next before the commencement of the suit, the precise dates whereof the promoter was unable to specify, had performed or sanctioned certain ceremonies alleged to be unlawful.

One of the articles charged the wearing when officiating in the Communion Service of divers dresses and things of divers forms and colours, and other than the habits appointed by law, without giving any specific description of the divers dresses and things complained of.

On motion to reject these articles:—

Held, that they were admissible.

Articles in a responsive plea, stating that the suit was being promoted contrary to the wish and desire of the parishioners, and that the promoter had a pew in an Independent chapel, ordered to be struck out as irrelevant.

THIS was a suit instituted by virtue of letters of request issued by the Bishop of Gloucester and Bristol, under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86), against the Rev. John Edwards the younger, Vicar of Prestbury, in the diocese of Gloucester and Bristol, and promoted by Charles Combe, a parishioner of Prestbury. The letters of request, which recited that a commission of inquiry had been issued on the application of Charles Combe, a parishioner of Prestbury, requested that the Rev. John Edwards the younger should be cited to answer certain articles to be administered to him at the voluntary promotion of the said Charles Combe. A decree, by letters of request, having issued out of the registry, an appearance was, on the 27th of March, 1874, entered on behalf of the defendant, and, on the 2nd of April, 1874, the proctor for the promoter brought in articles.

For the purpose of this report it is not necessary to set out the whole of the articles at length. It is sufficient to state that Arts. 4 to 9, both inclusive, contained charges against the defendant of having, when officiating in the parish church of Prestbury, on divers occasions within two years next before the commence-

See further proceedings Combe v. De La Bere 6 P.D. 157.

ment of the suit, performed and used, when there present and responsible as incumbent for the due performance of divine service therein and taking part in such service," "or caused or sanctioned and permitted," the performance and use of the following ceremonies, observances, and acts, i.e. the use of lighted candles during the celebration of the Communion and the performance of other parts of divine service, as a matter of ceremony, and when such candles were not wanted for the purpose of giving light; "the standing of the principal minister, or celebrant, on the west side of the holy table, between the holy table and the people, with the back to the people during the prayer of consecration" in the Communion Service; "the elevation of the paten, or bread, or wafer, and of the cup" in the Communion Service in a ceremonial manner; the use of wafer bread or wafers in the Communion Service; the mixing of water with the sacramental wine as a part of the ceremonies of the Communion Service, and the administration of the wine so mixed with water to communicants; the kneeling, prostrating, and bending the knee, and bending down of the head and body of the principal minister, or celebrant, in a marked and ceremonial and reverential manner during the prayer of consecration in the Communion Service.

The 12th article charged the wearing, when officiating in the Communion Service and in the administration of the Holy Communion, of divers ceremonial dresses, vestments, and things of divers forms and colours, and with divers decorations thereon other than and besides, or instead of, the habits appointed and allowed by law. The 13th article charged the wearing, when officiating in the Communion Service and in the administration of the Holy Communion as a matter of ceremony, of certain vestments, of things called respectively a chasuble, alb, amice, maniple, and stole.

The 10th and 11th articles were in substance as follows:—

10. That you, the defendant, in the said parish church of the said parish of Prestbury, on divers occasions within two years next before the commencement of the suit (to wit) on Sunday morning, February 23rd, 1873, on Sunday morning, April 13th, 1873, on Sunday morning, June 1st, 1873, and on Sunday morning, June 8th, 1873, and on divers other days and times within the said two years, the precise dates whereof the party proponent is unable to specify, when officiating in the service for the administration of the Holy Communion, made the sign of the cross by the appropriate gesture for that purpose when giving the elements to the communicants; and also then and there sanctioned and permitted the making

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of the like sign by your curate and other clergymen in your presence, when you were respectively officiating in the said service and giving the elements to the communicants, the same being performed by you and them as and constituting a ceremony.

11. That you, the said Rev. John Edwards the younger, in the said parish church of the said parish of Prestbury, on divers occasions within two years next before the commencement of the suit, (to wit) on Sunday morning, February 23rd, 1873, on Sunday morning, April 13, 1873, on Sunday morning, June the 1st, 1873, and on Sunday morning, June the 8th, 1873, and on divers other days and times within the said two years, the precise dates whereof the party proponent is unable to specify, during the performance of divine service and the administration of the Communion, and when you were officiating in the said church, placed or kept, or sanctioned, or permitted, the placing and keeping upon a shelf or ledge immediately above the holy table a metal crucifix with a figure of the Saviour thereon, having candles standing by the side thereof, which were lighted at certain parts of the service, the said crucifix not being a part of the architectural decorations of the church, but appearing to be connected with, or to stand in a ritual or symbolical and ceremonial relation to the holy table and the rites thereof. And that you also, in the said church on the said occasions, did in a ceremonial manner, immediately before and during the performance by you of divine service, bow and do reverence to or towards the said crucifix, and also then and there sanctioned or permitted such bowing and reverence on the part of other clergymen officiating in your presence.

14. That the said use of lighted candles, the said standing of the celebrant on the west side of the holy table between the holy table and the people, with the back to the people during the prayer of consecration, the said elevation of the paten, or bread, or wafer, and of the cup in the service for the Holy Communion; the said use of wafer-bread or wafers, the said mixing of water with the sacramental wine, and administration of wine mixed with water to communicants, the said kneeling and prostrating himself, bending the knee and genuflecting, and the said bowing down of the head and body by the celebrant during the prayer of consecration; the said making of the sign of the cross, the said placing and keeping of a crucifix on a ledge above the holy table, and the bowing thereto; the said wearing of ceremonial dresses, vestments, and things other than and besides the habits appointed and allowed by law; the said wearing of a chasuble, alb, amice, maniple, and stole, and all the ceremonies, observances, and acts performed, used, and done, as articled and complained of in the several preceding articles from the 4th to the 13th, were unlawfully performed, used, and done, and are respectively unlawful additions to and variations from the form and order prescribed by and appointed by the statutes in the 1st and 2nd of the articles mentioned (1 Eliz. c. 2; 13 & 14 Car. 2, c. 4; 28 & 29 Vict. c. 122; 34 & 35 Vict. c. 37; 35 & 36 Vict. c. 35), and by the Book of Common Prayer and administration of the sacraments, and other rites and ceremonies of the church, and are respectively contrary to the said statutes and to the constitutions and canons in the said articles mentioned (Canons 14, 36, 38, 58, of 1603), and that none of the services at which the said ceremonies, observances, and acts, hereinbefore complained of, took place, was an additional service, or a special service approved by the ordinary, within the intent and meaning of the Act of Parliament of the session holden in the 35th and 36th years of her present Majesty.

Each of the articles from 4 to 9, as also articles 12 and 13 respectively, in addition to an allegation of certain specified days and times on which the offence charged against the defendant in the particular article had been committed, further contained an averment of the commission of the offence "on divers days and times" within the two years next last past, without specifying the precise dates, in similar terms to the averments which are set out above in articles 10 and 11.

On the 30th of April the proctors for the defendant, having previously given notice that the admission of the articles would be opposed, filed heads of objections to the articles, which so far as material were as follows (1):—

A. That in each of the articles numbered from 4 to 13, both inclusive, acts are charged to have been committed by the defendant "on divers days and times within the said two years, the precise dates whereof the party proponent is unable to specify," and that such charges are vague and uncertain and such as the defendant cannot be prepared to meet. . . . . .

D. That in article 11 the defendant is charged with having "placed or kept or sanctioned or permitted the placing or keeping upon a shelf or ledge immediately over the holy table a metal crucifix with a figure of the Saviour thereon"; and that this charge is not an allegation of any ecclesiastical offence on the part of the defendant.

E. That in the last-mentioned article the crucifix is said to have been "appearing to be connected with or to stand in a ritual or symbolical or ceremonial relation to the holy table and the rites thereof;" and that such an allegation is argumentative, embarrassing, and prejudicial, and improperly pleaded.

F. That the charges in article 12 are vague and uncertain in not particularly specifying the dresses, vestments, and things therein alleged to have been worn, and such as the defendant cannot be prepared to meet.

1874. Nov. 27. *Dr. Deane, Q.C.*, and *Benjamin Shaw*, appeared on behalf of the promoter, and moved the Court to admit the articles as filed.

A. J. Stephens, Q.C., and *Jeune* (*W. G. F. Phillimore* with them), on behalf of the defendant, opposed the admission of the articles.

(1) There were two other heads of objections marked B. and C. In these it was objected that the phrases "as matter of ceremony," "in a ceremonial manner," and such like phrases were embarrassing; and that the charges that the defendant had sanctioned or permitted certain other persons to do certain acts did not amount to allegations of any ecclesiastical offence on the part of the defendant. These objections were, however, withdrawn by counsel on the hearing of the motion: see *Parnell* v. *Roughton*, Law Rep. 6 P. C. 46.

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It is not the practice of this court to allow particulars of the acts charged to be delivered between the parties; it is therefore only by the articles that a defendant can in a criminal suit ascertain what the precise charges made against him are. If the date of the alleged offence is not even approximately stated, how can a defendant possibly prepare his defence? The distinctive times on which each alleged act has been done would, if the suit is to succeed, have to be proved at the trial, and must be in the knowledge of the promoter; it must surely therefore be the right of the defendant to have a definite statement of such times set out in the pleadings. We therefore submit that the articles must be amended so as to confine them to charges of acts done on the occasions of which the precise dates are pleaded. With regard to article 12 there is an objection of a similar character. That article as drawn is too vague. The vestments and other things which the defendant is charged to have worn illegally should be stated in terms as in article 13. The 11th article charges the defendant with keeping or placing a metal crucifix in the church of Prestbury, &c. Now the crucifix referred to is an ornament of the church, and it is consistent with the article as pleaded, that it was placed in the church by some former churchwarden of the parish, or even by some third person without any authority at all. At any rate the case of *Ritchings* v. *Cordingley* (1) is a decided authority that the defendant by ordering it to be taken out of the church would have infringed the law. The same case shews also that if the ornament was considered illegal the proper course to have adopted would have been to have applied for a faculty for its removal. There is nothing alleged in the 11th article, which if proved would constitute the defendant a criminous clerk. Part of the same article, moreover, pleads a mere matter of opinion when it avers that the crucifix "appeared to be connected with or to stand in a ritual or symbolical and ceremonial relation to the holy table and the rites thereof." What evidence could be produced either to support or rebut this averment?

Dr. Deane, Q.C., in reply, referred to *Burder* v. *Speer* (2) and *Hebbert* v. *Purchas.* (3)

(1) Law Rep. 3 A. & E. 113. (2) 1 Notes of Cases, 39.
(3) Law Rep. 3 P. C. 605.

SIR ROBERT PHILLIMORE. Having regard to the precedents which are to be found on the point I think the allegations in the articles as to dates and times are sufficiently precise. The counsel for the promoter has bound himself to certain dates and times, but he further pleads that there may be certain other occasions on which similar acts occurred, but which occasions he is unable to specify. I am of opinion that the rules and practice of this Court permit of his so pleading. The only doubt I have as to admitting the articles as filed is as to the admissibility of that portion of the 11th article which alleges that the crucifix therein mentioned appeared to be connected with or to stand in a ritual or symbolical and ceremonial relation to the holy table and the rites thereof. I think that this allegation must be struck out. In the 12th article the defendant is charged with wearing divers ceremonial dresses, vestments, and things of divers forms and colours, and with divers decorations thereon, other than and besides and instead of the habits prescribed by the laws of the Church of England. I do not think there is any necessity for the promoter proceeding further, and stating what habits other than those prescribed by law were worn. On the whole, I am of opinion that if the alteration I have mentioned is made, that is, if the 11th article is amended by striking out from the words "but appearing" to "the rites thereof," the articles may be admitted to proof. I shall make no order as to costs.

The articles having been filed with the requisite amendment, a negative issue was given thereto, and the following responsive plea brought in on behalf of the defendant:—

1. The said John Edwards has been rector of the rectory and parish church of Prestbury for upwards of fourteen years. He has so diligently conducted his ministrations within the said parish that, in addition to the other services on Sundays, and the daily performance of morning and evening prayer, he has had for upwards of seven years a daily celebration of the Holy Communion. He has very large congregations at his services, and at Easter, 1874, 237 persons communicated in his said church, being an increase of 154 on the number that had so communicated at Easter, 1864. He has during his incumbency procured the restoration and beautifying of his church at a cost of 4000*l*.

2. The said Charles Combe is promoting this suit against the said John Edwards contrary to the wish and desire of the parishioners generally of the said

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parish. And, in fact, a large number, to wit, 238 persons, being communicants at the said church, whereof 197 persons are also parishioners of the said parish, have expressed to the said John Edwards, and to the lord bishop of the diocese, their dislike of this suit, and of the disturbance which it was causing, and about further to cause, in the parish.

3. The said Charles Combe had at the institution of this suit, and has now, a pew or seat in a chapel belonging to the religious body known as the Independents or Congregationalists, situate within the said parish, for which pew or seat he pays a rent, and he has constantly attended the religious services in the said chapel. He is promoting this suit at the instigation and at the costs of certain persons, to wit, the Baron De Ferrieres and certain other persons unknown to the defendant or his proctor, residing in the town of Cheltenham, in the county of Gloucester, all of whom are not inhabitants or parishioners of the said parish, and who have, in fact, no connection therewith or interest therein.

1875. Jan. 23. *Dr. Deane, Q.C.*, and *Shaw*, on behalf of the promoter, moved the Court to reject the second and third articles of the responsive plea. The second paragraph of the responsive plea is clearly irrelevant, and ought to be struck out: *Kemp* v. *Neville*. (1) The third paragraph is equally inadmissible, and if allowed to remain would open up very many irrelevant questions. Moreover, the Bishop of Gloucester and Bristol has permitted Mr. Combe to promote his office, and this Court will not re-open a question which the ordinary in his discretion has decided, or inquire whether the promoter in prosecuting this suit is acting otherwise than with good faith. Indeed, in the case of *Martin* v. *Mackonochie* (2), an analogous objection was taken to Mr. Martin promoting the suit, but without success. It is, in fact, contrary to the practice of the Court to plead matters which can only raise irrelevant issues, and as to which in all probability no admissible evidence can be given: *Sumner* v. *Wix* (3); *Martin* v. *Mackonochie*. (4)

A. J. Stephens, Q.C., and *Jeune* (*W. G. F. Phillimore* with them), in support of the responsive plea. The allegations in the paragraphs objected to all raise issues which are material with regard to the question of costs. No objection is raised to the first paragraph, and it is admitted that that paragraph is well pleaded, as bringing facts to the notice of the Court which relate to the defendant's con-

(1) 10 C.B. (N.S.) 523; 31 L. J. (C.P.) 158.
(2) Law Rep. 2 A. & E. 116.
(3) Law Rep. 3 A. & E. 58.
(4) Ante, p. 279.

duct as a clergyman, and which, if proven, might induce the Court to mitigate the sentence it might otherwise pass: *Sumner* v. *Wix*. (1) Now, the second paragraph is merely explanatory of the first paragraph, and on that ground alone ought to be admitted to proof. It is true that the third paragraph does raise a subordinate issue, but surely when the question of costs comes to be discussed, the fact that the promoter of the suit is accustomed to associate with a sect having nothing in common with the Church of England might be expected to have some influence in matters within the discretion of the Court. Similar pleas to those now objected to were pleaded without objection in the first and second cases of *Martin* v. *Mackonochie*. (2) The judgment of the Court on the admission of the articles in the case of *Sumner* v. *Wix* (1), is really in favour of the admissibility of the responsive plea in this case.

Dr. Deane, Q.C., in reply.

SIR ROBERT PHILLIMORE. It may be that in former cases the practice of this Court with regard to pleading has been more lax than in strictness it ought to have been; but I certainly am not disposed to allow any error once brought to my notice to be perpetuated, and I must say that, in my opinion, both the second and third articles of the responsive plea ought to be struck out. I think the costs must be costs in the cause.

Proctors for promoter: *Moore & Currey.*
Proctor for defendant: *Brooks.*

(1) Law Rep. 3 A. & E. 58. (2) Ante, p. 279.

1875
July 31.

[IN THE ARCHES COURT OF CANTERBURY.]

KEET *v.* SMITH AND OTHERS.

Inscription on a Gravestone—Right of the Incumbent of a Parish to prohibit Erection of a Gravestone in the Parish Churchyard.

A churchyard is the freehold of the incumbent, subject to the right of the parishioners to interment. The incumbent has a primâ facie right to prohibit altogether the placing of any gravestone in his churchyard, subject to the control of the ordinary. Where the incumbent has refused to allow a gravestone to be erected and application is made to the ordinary for a faculty for its erection, it is in the discretion of the ordinary to grant or refuse a faculty, and where the Bishop has expressed an adverse opinion to the gravestone, and his chancellor has refused a faculty the Court of appeal will not overrule the decision unless it is clear that the discretion vested in the ordinary has been improperly exercised.

The daughter of H. K., a regularly appointed permanent minister of the Wesleyan denomination, was buried in the churchyard of the parish in which her father resided. The incumbent of the parish refused to allow a stone with an inscription describing the deceased as the daughter of the "Rev." H. K., "Wesleyan Minister," to be erected over the grave. H. K. then applied to the Bishop, and the Bishop replied by letter, and expressed an opinion that the title of reverend should not be allowed upon the stone. Formal application was then made to the chancellor of the diocese to issue the usual citation, in order to obtain a faculty for the erection of the stone, and after argument, he refused to do so. On appeal, the Dean of the Court of Arches, without pronouncing that the prefixing of the title "reverend" was illegal, affirmed the decision of the Court below.

Cited in R. C. 1 Prob. D. 73.

THIS was an appeal from the Consistory Court of Lincoln. The facts appear from the following petition:—

"To the worshipful Walter George Frank Phillimore, vicar-general of the Right Reverend Father in God, Christopher, by divine permission, Lord Bishop of Lincoln, and official principal of the Episcopal Consistory Court of Lincoln aforesaid.

"The humble petition of the Reverend Henry Keet, Wesleyan minister, of Owston Ferry, in the county of Lincoln, sheweth:—

"1. That your petitioner has been for the last two years, and now is a parishioner of and resident in the parish of Owston Ferry aforesaid, of which parish the Reverend George Edward Smith, clerk, has been for many years past, and was during the year 1874, and now is, the vicar and incumbent.

"2. That in the month of May, 1874, your petitioner's daughter Annie Augusta Keet died, and was buried in the churchyard attached to the parish church of the said parish of Owston Ferry.

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"3. That your petitioner is desirous of erecting over the grave of his said daughter, a tombstone of suitable material, of the size, and shape, and dimensions shewn in the plan hereto annexed, and bearing an inscription as appears upon the said plan, marked A. (1)

"4. That the said vicar, without good cause, refuses to allow your petitioner to erect such tombstone bearing such inscription.

"5. That your petitioner having been informed by a stonemason that the said vicar objected to the erection of the said tombstone, wrote to him on the 2nd of June, 1874, as follows:—

June 2nd, 1874.

Sir,—The enclosed is a copy of the inscription we gave to Mr. Barningham to be placed on the stone, denoting where the remains of my dear child lie. I have been informed by him that you have an objection to it. Will you therefore please write me on the subject at your earliest convenience?

I am, Sir, yours truly,

Rev. G. E. Smith. Henry Keet.

"6. No reply having been received to the said letter, your petitioner again wrote to the said vicar on the 8th of June, 1874, a letter as follows:—

June 8th, 1874.

Sir,—Having heard from Mr. Barningham, that you object to the words "reverend" and "Wesleyan minister" being inserted, and as I find similar expressions on tombstones in Epworth churchyard, will you kindly give me the *reasons* of your objection?

It will be a great disappointment not to be able to have a stone. May I beg the courtesy of a reply per bearer.

Yours truly,

H. Keet.

"7. To this letter your petitioner received a verbal reply through a servant, to the following effect, 'Tell Mr. Keet that I saw Mr. Barningham last week, and that I have no more to say.'

"8. That on the 10th of June, 1874, your petitioner wrote to the Lord Bishop of Lincoln, as follows:—

Owston Ferry, June 10th, 1874.

My Lord,—I have recently ordered a stone to be placed in the Owston Ferry churchyard in memory of my dear child, and prepared a suitable epitaph to be placed upon it. To my surprise and grief, the Reverend G. E. Smith, the vicar

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(1) The inscription was as follows: "I.H.S. In loving memory of Annie Augusta Keet, the younger daughter of the Revd. H. Keet, Wesleyan Minister, who died at Owston Ferry May 11th, 1874, aged 7 years and 9 months. Safe sheltered from the storms of life."

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of this parish, has refused the insertion of the words "reverend" and "Wesleyan minister," and I cannot obtain from him *any reason* for his objection, to which I think I am fairly entitled. As the above words are considered so objectionable by Mr. Smith, and allowed in the Epworth churchyard and other burial places, will your lordship kindly inform me if there is any ecclesiastical law which prohibits the insertion of such phrases; and if so, why the law may be violated in other cases.

A reply as early as possible, will greatly oblige,

Yours truly,
Henry Keet.

"9. That your petitioner received the following reply:—

Riseholme, Lincoln, June 11th, 1874.

Sir,—In reply to your letter received this morning, I beg to inform you that it is the duty of an incumbent to examine the epitaphs which it may be proposed to inscribe on gravestones in the churchyard of his parish; and that he is empowered by law to make objections to anything in them which in his judgment is liable to exception.

I am, sir, yours faithfully,
C. Lincoln.

"10. That your petitioner, on the 3rd of July, 1874, wrote to his Grace the Archbishop of Canterbury, as follows:—

Owston Ferry, viâ Bawtry, July 3rd, 1874.

To his Grace the Archbishop of Canterbury,—Having recently lost a dear child, and interred her in the Owston Ferry churchyard, I requested a mason to put up a stone with the following inscription: "In loving memory of Annie Augusta Keet, the younger daughter of Reverend H. Keet, Wesleyan Minister, who died at Owston Ferry, May 11th, 1874. Safe sheltered from the storms of life." To my great surprise and grief, the Rev. G. E. Smith, the vicar, has refused to admit the stone into the yard, unless the words "reverend" and "Wesleyan minister" are left out. Will you kindly inform me whether the vicar has the right to object to a stone bearing a title which is acknowledged by the government of the kingdom, and in accordance with general usage? Dr. Ace, the vicar of Laughton, who is acquainted with the case, has in kindly sympathy requested me to submit it to your consideration, and also reminded me of the fact that some years ago the vicar of Easingwold interposed a similar objection to the word "reverend" being placed on Dr. Newton's tombstone, and that Dr. Musgrave, the Archbishop of York, strongly recommended the incumbent to withdraw such an objection as a matter of prudence and policy, and not tending to produce godliness and brotherly love.

Waiting the favour of your kind reply,

I am, my Lord, yours truly,
Henry Keet.

"11. That your petitioner received the following reply:—

Lambeth Palace, S.E., 13th July, 1874.

Dear Sir,—I am sorry that press of business has prevented my sooner answering your letter of the 3rd inst., on the subject of the proposed inscription on the

tombstone to your daughter, which you state that "The Rev. G. E. Smith, the vicar of Owston Ferry, has refused to admit into the churchyard, unless the words 'reverend,' and 'Wesleyan minister,' are left out."

I presume from what you say, that you are a regularly appointed permanent minister of the Wesleyan denomination.

I do not feel called upon to give an opinion as to the legal question, whether in so doing Mr. Smith keeps within his rights; but I certainly consider that the objection you mention as urged by him, is one which ought not to be made. I should be surprised if the bishop of the diocese, should you apply to him, did not take the same view as myself.

Believe me to be, yours faithfully,

The Rev. Henry Keet. A. C. Cantuar.

"12. That your petitioner on the 15th of July, 1874, again wrote to the Lord Bishop of Lincoln, as follows:—

Owston Ferry, July 15th, 1874.

My Lord,—Since I received your kind reply, I have met with Dr. Ace of Laughton, who deeply sympathises with me, and recommended me to write to the Archbishop of Canterbury. I have enclosed for your perusal a copy of my letter to his Grace, and his reply. As the vicar, the Rev. G. E. Smith, refuses to communicate with me on the subject (excepting a verbal negative through the stonemason), I now, with the greatest deference, but most earnestly beg your Lordship's kind offices with the vicar that the objection may be withdrawn. As a parent I am very anxious to erect a stone to the memory of my dear departed child; and this feeling is intensified by knowing that I cannot remain long located in this place, as by the law of the Wesleyan Conference no minister can remain more than three years in a circuit.

I am, my Lord, yours faithfully,

Henry Keet.

"13. That your petitioner received the following reply:—

Riseholme, Lincoln, 16th July, 1874.

Sir,—I beg to acknowledge your letter of yesterday, inclosing a copy of one from the Archbishop of Canterbury.

It is to be regretted that the claim urged by you as a Wesleyan preacher to be designated by the title of "reverend" upon a monument to be erected in a burial place of the Church of England should be mixed up with the question of paying a tribute of parental affection to a beloved daughter now no more.

What title should be given you by your own co-religionists is not the point at issue, and I express no opinion upon it. But the question is, whether the title of reverend should be conceded to you on a tombstone by ministers of the Church of England, who are the responsible guardians of her churchyards.

It is not easy to determine what is the exact meaning of the title of reverend as claimed by a Wesleyan preacher.

If that title is to be taken to imply that he is a person in holy orders, duly qualified to minister the word of God and sacraments in a church, then I am bound to say that the laws to which I am subject would not allow me to recognize him in that capacity.

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I hope to have the happiness before long of admitting some Wesleyan preachers to holy orders in the Church of England after due training and trial, but I should be chargeable with equivocation and duplicity towards them, and with dishonesty and treachery towards the Church of England, if I were now to designate them by the title of reverend, to which they will have a just claim after ordination and by its means. If the title of "reverend" to which you lay claim, and by which you desire to be designated in a consecrated burial place of the Church of England, is intended only to indicate that you are appointed to preach in a Wesleyan place of worship, I would venture to remind you of another epitaph—that which was inscribed on the tomb of the founder of Wesleyanism himself. There John Wesley was described as "the patron and friend of lay preachers." He regarded his preachers as laymen; he warned them against calling themselves ministers, and after his death the Wesleyan Conference, in 1793 and 1794, forbade them to assume the title of reverend. Any one who gives them that title contravenes the injunctions of John Wesley, for whose memory I entertain sincere respect, and to whose authority I desire to defer in my relations with the members of that important religious community which derives its name from him.

A title is a distinctive attribute belonging to a special person or class. If I give a title to a person to whom it does not belong, I am liable to the charge of flattering him and of wronging those to whom the title does belong.

For such reasons as these I have abstained from giving the title of "reverend" to Wesleyan preachers, not (I need hardly say) from any feeling of disparagement towards them, but because I honour consistency and truth; and because I am sure they would despise me if I acted against my conscience and were to practise that kind of liberality which courts popularity by giving away what does not belong to it.

I am, dear sir,
Yours faithfully,
C. Lincoln.

Mr. Henry Keet,
Wesleyan Preacher.

"14. That your petitioner submits that the said tombstone bearing the said inscription is such as your petitioner ought to be permitted to erect over the said grave.

"Your petitioner therefore prays that you will be pleased to grant him a licence or faculty to erect the said tombstone bearing the said inscription as aforesaid."

On the petition being presented the learned Chancellor of the Diocese intimated that he was not of opinion that it was a proper case for him to decree a citation, but stated that he would be very ready to hear arguments upon motion before him. Accordingly the proctor for the petitioner moved the Chancellor for a citation, and the further hearing of the motion was adjourned to a subsequent day, when *A. J. Stephens, Q.C.*, and *Bayford* appeared for the petitioner and argued the case.

The learned Chancellor having taken time to consider the

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arguments, on the 3rd of June, 1875, delivered the following judgment:—

This is an application to the Court to issue the usual citation and intimation in order to obtain a faculty for the erection of a particular tombstone in the churchyard of the parish of Owston Ferry. The petition is filed on behalf of a gentleman who describes himself as "The Reverend Henry Keet, Wesleyan Minister, of Owston Ferry, in the county of Lincoln." It states that the petitioner is a resident parishioner in the parish of Owston Ferry; that in the month of May, 1874, he lost a daughter, who was buried in the churchyard of the parish; and that he is anxious to erect over her grave a tombstone of the shape and size, and having on it the inscription, given in the plan annexed to the petition.

This plan shews a tombstone of apparently very proper shape and size, having this inscription:—"In loving memory of Annie Augusta Keet, the younger daughter of the Reverend H. Keet, Wesleyan Minister, who died at Owston Ferry, May 11th, 1874, aged 7 years and 9 months. Safe sheltered from the storms of life." The petition then states that the vicar of the parish, without good cause, refuses to allow the petitioner to erect such a tombstone bearing such an inscription; and it sets out certain letters and certain oral communications from the vicar, whereby it would appear that the vicar's objection was not to the tombstone, but to the words "reverend" and "Wesleyan minister" in the inscription.

It then sets out a letter from the petitioner to the bishop of the diocese, complaining of the action of the vicar; and an answer from the bishop, "that it is the duty of the incumbent to examine the epitaphs which it may be proposed to inscribe on gravestones in the churchyard of his parish, and that he is empowered by law to make objections to anything in them which in his judgment is liable to exception."

It then sets out a letter to the archbishop of the province, complaining of the action of the vicar, but making no mention of the correspondence with the bishop; and an answer of the archbishop.

It would appear that the archbishop, presuming that the petitioner is a regularly-appointed permanent minister of the Wesleyan denomination, did not feel called upon to give a legal opinion as to the action of the incumbent, but certainly considered that the objections urged by him should not be made. The letter of the archbishop is stated—and this point was much pressed upon me by counsel—to be addressed to "The Revd. Henry Keet." The petition next states a second letter from the petitioner to the bishop, purporting to inclose the correspondence with the archbishop, and asking for the bishop's "kind offices with the vicar that the objection may be withdrawn;" and an answer from the bishop, explaining why he could not do so. The reasons appear to be, that this is not a question of the ordinary use of a courtesy-title, but of a recognition by the representative of the Church of the propriety of the title claimed; that if the term "reverend" implies ordination, or a capacity to minister the word of God and the sacraments, it is contrary to the laws of the Church to ascribe the term to a Wesleyan minister or preacher; and the letter further points out that the assumption of the title is in contravention of the teaching of John Wesley, the founder of the Wesleyans, and of the rules of the Wesleyan Conference.

The petition then prays for a faculty to erect this tombstone with this inscription on it.

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With regard to the correspondence stated in the petition, it is matter of unquestionable law that neither the bishop nor the archbishop could by their own personal authority overrule the action of the incumbent. That action can only be overruled by process in their Courts. I presume, however, that it was the "kind offices" of the archbishop and bishop that were solicited in the applications made to them, and it is on this footing that the several answers appear to be returned.

The expressed opinions of the archbishop and of the bishop ought, however, to have great weight with the Court, though I have never known an instance before this where the opinion of any but the immediate ordinary has been brought before the Court.

On the petition being presented to me, I requested the registrar to inform the proctor of the petitioner that, upon the statements contained in it, I was not then of opinion that it was a proper case to decree a citation, but that, if wished, I would readily hold a Court and hear argument from proctor or counsel. I accordingly held a Court, and the proctor appeared, and prayed to make certain amendments in the petition, which I granted, and then formally without argument moved for a citation. I expressed my opinion that this was hardly the proper course to take, and thereupon, at the proctor's request, I adjourned the hearing to enable him to prepare reasons for the issue of the citation, or to instruct counsel to do so.

At the adjourned hearing Dr. Stephens and Mr. Bayford appeared as counsel for the petitioner, and to their arguments I am much indebted.

It was first urged upon me that the course I had taken in directing this citation to be moved was contrary to the established practice and inconvenient, and that the inconvenience would be increased if I refused to issue the citation. It was stated that the proper course was to issue the citation, and that the Court was not thereby bound, but could still, even if no opponent appeared, direct the faculty to be moved for, and if it thought right, refuse it. There are several reported cases in the Consistory of London where the practice suggested by counsel has been followed. But in that Court there appear to be no less than three ways of procedure: as there is at least one reported instance where the course which I have taken in this case was taken by the judge, and one case where a third course was taken.

The course which I have taken in this case is supported by many precedents, is, I think, the more reasonable and convenient one, and has the special sanction of high authority. The precedents are:—*Rector and Churchwardens* v. *Parishioners of St John's, Walbrook* (1), a case in the Consistory Court of London, before Dr. Lushington; *Pearce and Hughes* v. *Rector of Clapham* (2), a case before the Commissary of Surrey, appealed to the Arches Court; *Peel* v. *Vicar of Tamworth* (3), appealed from Lichfield to the Arches Court in 1872; and *In re Bettison* (4), appealed from Rochester to the Arches Court. There was also in my knowledge a case not dissimilar to the present, where an application was made for a faculty to overrule the incumbent, who had refused to allow the erection of a monumental cross in his churchyard. The parish was in the diocese of Canterbury, and on the petition being presented, the then Commissary of Canter-

(1) 2 Rob. Eccl. 515.
(2) 3 Hagg. Eccl. 10.
(3) Not reported.
(4) Ante, p. 294.

bury, Sir Travers Twiss, refused to issue a citation, and the matter went no further.

The course taken in this case is, I think, the more reasonable and convenient one, because the citation in a faculty case is not a simple citation, but a citation with intimation. It usually recites that the Court is willing or disposed to grant the prayer of the petition, and proceeds not merely to cite all persons having any interest to appear, but further intimates that if they do not appear, or appearing, offer no valid objection, the Court will proceed to decree the faculty. It is hardly desirable that this should be solemnly stated, and that the Court should (though no objection is offered) refuse to decree the faculty. If, moreover, the view taken by the Court is that the faculty is one which, though unopposed, should not be granted, it is a saving of time and of expense to the petitioner so to decide at once; while, if the petitioner is not disposed to acquiesce in the decision of the Court, he can as readily appeal from the refusal to issue a citation as from the refusal to decree a faculty.

This course has the special sanction of high authority. In the case of *Pearce and Hughes* v. *Rector, &c., of Clapham* (1), the conduct of the Commissary of Surrey in refusing a citation was complained of as contrary to the practice; but the judge of the Arches Court, Sir William Wynne, said:—"This was originally an application to the commissary of Surrey, on behalf of the churchwardens of Clapham, for a decree with intimation against the vicar and inhabitants to shew cause why a faculty should not be granted for erecting an organ in the west gallery of Clapham Church. The ordinary practice is said to be for a decree of this nature to issue, as other citations and decrees, without motion of counsel, and on the return of the decree the Court has formed its opinion, considering the issuing of the decree as not binding on the Court, even if no one appeared to oppose; but that the Court might look at all the circumstances, and if it thought the application improper, would refuse it. In the present case a different method has been pursued, and, I think, one that is more regular; because, in these decrees an intimation is inserted, that if no one appear to shew cause, the faculty shall go, which looks like an engagement to grant it unless an objection be taken. I therefore think it is more proper for the Court to take the objection in the first instance."

It was then urged upon me by counsel, that I should issue a citation without an intimation; and the case of *White* v. *Bowron* (2) was cited as a precedent for this. That, however, was not a satisfactory case; for, though there were, as it afterwards proved, many objectors, none came in in answer to the citation, and the case had, at its latest stage, to be specially opened to allow them to come in. Moreover, the practice of issuing a citation with intimation before granting a faculty has been so nearly invariable, that I doubt much whether a faculty not founded upon such a citation and intimation would be held to be validly granted. Unless, therefore, I should be prepared, if no objectors appeared to the citation, to decree this faculty, I am of opinion that I ought not to order this citation to issue. I come, therefore, to consider whether this is a case for a faculty.

The law on this subject is expressed in the cases of *Maidman* v. *Malpas* (3)

(1) 3 Hagg. Eccl. 10. (2) Ante, p. 207.
(3) 1 Hagg. Cons. 205.

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and *Breeks* v. *Woolfrey*. (1) In the former case Lord Stowell says: "All parishioners have a right to be buried in the churchyard without leave of the incumbent; but the permission of the ordinary is necessary before any monument can properly be erected. It is to his care that the fabric of the church is committed, that it shall not be injured or deformed by the caprice of individuals. The consent of the incumbent is taken on such occasions; and especially of the rector, for monuments in the chancel. A faculty is likewise required, though it is frequently omitted, under the confidence reposed in the minister, and the Ecclesiastical Court is not eager to interpose. But when cases are brought before it, it is necessary to inquire whether the thing is proper to be done, and whether the consent of the incumbent has been obtained" (2); and in the latter case the Judge of the Arches Court said: "This being a criminal proceeding, the burthen of proving the charge lies on the promoter; and the clergyman of the parish is not an improper person to proceed in such a case, for to the incumbent belongs the superintendence of the church and churchyard, and it is his duty to take care that no inscription should be placed there which could be made the means of disseminating doctrines inconsistent with those of the established religion." (3) Near the commencement of the judgment of the latter case I find the following passage: "It is a cause in which the office of the judge has been promoted by the Rev. John Breeks, vicar of the parish of Carisbrooke, in the Isle of Wight, against Mary Woolfrey, of that parish, widow, citing her to answer to certain articles 'touching and concerning her soul's health, and for the lawful correction of her manners and excesses,'—which is the usual style and language of the proceedings of the Court—and more especially for having erected, or caused to be erected, a certain tombstone in the churchyard of the same parish, to the memory of Joseph Woolfrey, late of the parish, deceased, with a certain inscription thereon, contrary to the articles, canons, and constitutions, or to the doctrine and discipline of the Church of England. . . . The offence is one clearly of ecclesiastical cognisance, and it was not denied, nay, it was admitted, that if the inscriptions were of the character attributed to them in the citation, no person had a right to erect a tombstone with such inscriptions impugning the doctrine and discipline of the Church of England, and that a person so offending is liable to be punished, and the tombstone to be removed."

When, therefore, it appears that "the consent of the incumbent" has not been obtained, I must inquire whether the inscription proposed "could be made the means of disseminating doctrines inconsistent with those of the established religion," and whether the thing proposed "is proper to be done."

First, then, is the inscription proposed contrary to the articles, canons, or constitutions, or to the doctrine and discipline of the Church of England?

It was contended before me that a Wesleyan minister has the like right to the title of "reverend" as the clergy of our Church have, and that the title "reverend" is not exclusively applicable to the clergy, but is applicable to all worthy of reverence. It may be that the title "reverend" is not one actually by law appropriated to the clergy: I will consider hereafter the effect of the custom as to its use. But if so, it is to be used in this inscription as implying that the

(1) 1 Curt. 880. (2) 1 Hagg. Cons. at p. 208.
(3) 1 Curt. at p. 887.

person to whom it is ascribed is worthy of reverence. Can it be said by the authorities of our church that a Wesleyan minister is, as such, "worthy of reverence"? He may have, and probably has, many estimable qualities; we may esteem the motive that has led him to offer himself, however erroneously and without commission, to minister in holy things; we may remember with sorrow the many historical palliations for the rise and existence of his sect: but his claim of his office is an admission that he is a schismatic, and not merely so, but a chief among schismatics; and the claim to describe that office, or the office-bearer, as being, as such (and no other reason is given), worthy of reverence, is a claim to have schism honoured instead of lamented over. Inscriptions are set on tombstones in praise, not in blame, of those to whom they refer (3rd Institute, p. 203). Bearing in mind the general law of the Church, and also Canon 9 of the Canons of 1603, and the history of the Wesleyan Methodists, I doubt much whether the words "Wesleyan minister" alone would not be unlawful: and I am of opinion that to describe a person as being a "reverend" Wesleyan minister might "be made the means of disseminating doctrines inconsistent with those of our Church."

But, though the inscription were not unlawful, I have further "to inquire whether the thing is proper to be done;" and in doing so, I cannot forget that the word "reverend" has for a long time been used, either alone or with some adverb, as the epithet of almost all ranks of our clergy.

It was contended before me that this use of the word was not earlier than the end of the seventeenth century, and indeed, on the authority of Mr. Maskall, that it was hardly earlier than 1732. I should not have thought it of much importance for this inquiry whether the word has been thus used 100, 150, 200, or more years. But, as a matter of fact, the time contended for by the counsel for the petitioner is too short.

The title "Reverend Father in God," as applied to a bishop, is in the Ordinal of 1552. In Roger Ascham's letters, which range from 1539 to 1568, I find a letter of 1541, beginning thus:—"Reverendo in Christo Patri ac Domino D. Thomæ, Westmonasteriensi." In other letters a bishop is addressed as "Ornatissimus;" but in several letters to both archbishops—some from Roger Ascham, some from Walter Haddon—they are invariably called "Reverendissimus"—"Most Reverend." One of those letters is in 1541. The second edition of some of Izaak Walton's Lives is addressed "To the Right Honourable and Reverend Father in God, George, Lord Bishop of Winchester." The separate Life of Dr. Sanderson is addressed to "The Right Reverend and Honourable George, Lord Bishop of Winchester, Prelate of the Garter, and one of His Majesty's Privy Council." Walton appears to have published the first edition of his first Life (that of Dr. Donne) before 1644. He died in 1683. In his Life of Hooker he has this passage: "At which time the Reverend Dr. Humphrey Henchman, now Lord Bishop of London;" and in another place he writes, "As Reverend Mr. Hooker says." However this may be, it cannot be and was not denied, that for a very long period the word "reverend" has been used as a title of the clergy. In Todd's edition of Dr. Johnson's Dictionary, I find these meanings given to the word "reverend":—

"(1.) Venerable: deserving reverence; exacting respect by his appearance."

"(2.) The honorary epithet of the clergy. We style a clergyman *reverend*; a bishop, *right reverend*; an archbishop, *most reverend*."

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In Webster's Dictionary it is thus defined:—

"(1.) Worthy of reverence; entitled to respect, mingled with fear and affection, as reverend and gracious senators."

"(2.) A title of respect given to the clergy or ecclesiastics. We style a clergyman *reverend;* a bishop is styled *right reverend;* an archbishop, *most reverend.* In England a dean is also styled *very reverend.* In Roman Catholic countries, the members of the different religious orders are styled *reverend.*"

Professor Latham, in his Dictionary of the English Language, adopts Dr. Johnson's definition.

It was not contended before me that a Wesleyan minister had any claim to be considered to be in holy orders. It could not be so contended historically. John and Charles Wesley were, indeed, priests of the Church of England, as were some others of their companions. But the Wesleyans never had any bishop among them. Nor, indeed, did John Wesley, or, so far as it appears, any other of the clergy of the Church who were among the early Wesleyans, purport or assume to confer ordination, except in the peculiar cases of certain ministers sent to Scotland and to America. If they had done so, their ordination would have been of no avail. So far, however, from their doing so, John Wesley took pains to discourage any notion that his preachers were, as such, in the position of the clergy of the church; and for at least some years after his death the Wesleyan Conference followed him.

And it is a remarkable testimony to the force of the word "reverend," and its appropriation to our clergy, that the most effectual way the Conference could devise to check the idea that their preachers were in the position of our clergy was to forbid their calling themselves "reverend." In "The Ecclesiastical Principles and Polity of the Wesleyan Methodists, by William Pierce, revised by Frederick J. Jobson, D.D.," 3rd ed. (a work quasi officially published at the Wesleyan Conference Office), I find at p. 278 this passage:—"At the Conference of 1792 it was resolved that 'no ordination shall take place in the Methodist Connexion without the consent of the Conference first obtained. If any brother shall break the above-mentioned rule, by ordaining or being ordained, without the consent of the Conference previously obtained, the brother so breaking the rule does thereby exclude himself:'" Minutes, 1792, vol. i., p. 270. This rule is also to be found in the Large Minutes, with some slight alterations. A copy of these rules is still given to each preacher when taken upon trial. The rule therein on ordination is as follows:—"No ordination shall take place in our Connexion without the consent of the Conference, nor shall gowns or bands be used among us, or the title of 'reverend' be used at all. And if any brother shall break the above-mentioned rule he thereby excludes himself from the Connexion:" Large Minutes, p. 52. The above minute was adopted in consequence of some irregularities respecting ordination which had taken place and given great offence in the preceding year." Mr. Blunt, in his Dictionary of Sects, Heresies, Ecclesiastical Parties, and Schools of Thought, title Methodists, at p. 317, says that, in 1794, resolutions were passed by the Conference, one of which was—"All *ecclesiastical* titles, such as *reverend*, &c.," shall be "laid aside, as also gowns, bands, &c., agreeably to the resolution of the Conference held at Leeds in 1793."

Whether the term "reverend," with its adverbial accompaniments, be from force of long user now a legal title of persons in holy orders, according to their various ranks, or whether it be merely a courtesy title, it would appear that in

ordinary usage it is specially appropriated to them. It not being contended that the petitioner is in any sense in holy orders, I cannot discover on what ground it is conceived that this title belongs to him. I was informed, indeed, in the course of the arguments, that ministers of all religious denominations (at least, so I understood) were styled "reverend" in grants of probate and letters of administration; and something was said, but not with any certainty or precision, of some application of the word by the Crown to unordained ministers, either singly or in bodies. But though the petition, styling him as the "Reverend Henry Keet," seems to challenge the title as one of legal right, the argument negatived this view, for it was to the effect that "reverend" was the legal title of no class of persons.

If it be a mere courtesy title, it may be very fitting that it should be applied by the members of the religious body among themselves, or by the general usage of society. But this does not make it a "proper thing to be done" by the authorities of the Church to authorize an inscription conferring that title, when no good can come from it; but, on the contrary, much confusion in the minds of her less well-instructed members, and some encouragement of a schism which she laments, and is even forced to reprobate, may not improbably arise thereby.

If it is put on the footing of a courtesy title, so would be that of the President of the Wesleyan Conference, who, Mr. Blunt states (Ibid. note), "has recently been styled 'right reverend.'" Would he have a right to have this title, which by long custom and, I think, legal implication, is appropriate to bishops, given to him by our Church?

Priests and bishops of the Roman Catholic communion are in holy orders, and may lay claim therefore to the titles of "reverend" and "right reverend;" but could a Roman Catholic bishop in England insist upon receiving a recognition from the authorities of our Church of the diocese which he has taken to himself in England? Could, for instance, the representatives of the Roman Catholic bishop, who calls himself "Bishop of Nottingham," insist upon on inscription in the churchyard or church of St. Mary's, Nottingham, which should describe him as "Bishop of Nottingham;" or could the authorities of a church in Westminster be compelled to describe another Roman Catholic prelate as Archbishop of Westminster?" I think not. And yet I see no substantial distinction between these cases and that before me. The endeavour seems to be to obtain an authoritative sanction by the Church of this title. The inscription does not run as if this were a mere claim of the title by this gentleman—it states his title as a fact. If the description had been worded in any way which would shew that this was an asserted title, I would have strained a point in its favour; I would have issued a citation, and would, if no objection had appeared, have afterwards decreed a faculty. I would do so now on a fresh petition, proposing such a modified inscription. But, as it stands, I must refuse this citation.

In consequence of this decision an appeal was prosecuted to the Court of Arches, and on the libel of appeal being admitted, a citation issued out of the registry in the ordinary course, citing the vicar of the parish of Owston-Ferry and the churchwardens and parishioners of the parish to enter an appearance in the appeal. Service of this citation was duly effected, but no appear-

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ance was entered in obedience thereto; and on the 24th of July, 1875, the appeal came on to be heard.

A. J. Stephens, Q.C., and *Bayford*, appeared for the petitioner. The appellant is a parishioner of Owston-Ferry, and he therefore has undoubtedly, both for himself and his family, the right of burial in the churchyard of the parish. To this right of burial the erection of a tombstone with the name and description of the deceased is by universal consent now incident: *Bardin* v. *Callcott* (1); 3 Inst. 203; and indeed the common law considers that, although the freehold of the churchyard be in the incumbent, yet that the property in tombstones and monuments is vested in those that erect the same, or in the heirs of the deceased in whose memory they are set up: *Spooner* v. *Brewster*. (2)

[SIR ROBERT PHILLIMORE. I agree with this, but I would wish to suggest to you this question. Has a parishioner any right in law to put up any tombstone at all?]

It is not necessary to argue that a parishioner has such a right, for in this case the incumbent has not forbidden the erection of a tombstone, he has only refused to allow a particular inscription to be placed on the tombstone which it is proposed to erect; the only question, therefore, for the Court to decide is whether this particular inscription desired by the appellant is opposed either to the law of the land, to religion, or to decency. For only on one or other of these three grounds can the action of the vicar be justified. With regard to the term "Wesleyan minister," no valid objection can remain when the doctrines of the Wesleyan community are remembered: Dr. Curteis, Bampton Lectures for 1871, pp. 345, 673; Pierce's Ecclesiastical Principles of Wesleyan Methodists, vol. i., p. 278. A Wesleyan has never been and cannot be regarded by the Church of England as a schismatic or heretic: *Masten* v. *Escott*. (3) "Minister" is the proper term which the legislature itself has employed to designate persons in the position of Mr. Keet: 1 Wm. & M. c. 18, s. 11. This statute clearly recognizes the right of all "ministers" to carry out the ordinances of their religion in this country, and to a certain degree admits

(1) 1 Hagg. Cons. 14.
(2) 3 Bing. 136.
(3) 2 Curt. 692, 793.

the sacredness of their character. It is not the fact that the ministers of the Wesleyans are at the present day forbidden to assume the title of "reverend." It is true that in 1794 it was resolved by the Wesleyan Conference "that all titles should be laid aside" by Wesleyan ministers; but at the conference held at Stafford in 1811 this resolution was, as regards the title of "reverend," repealed, and since that time the title has been used by Wesleyan ministers on all public occasions, and has been by common consent and general usage accorded to them.

There is no reason for supposing that the clergy of the Church of England have an exclusive right to be styled "reverend." No law, custom, or usage can be shewn which has given them such a right. It may be that at the present day the epithet is ordinarily accorded to them, but it is well known that formerly it was applied to other than clerics: see the Paston Letters, edited by James Gairdner (London, 1872), vol. 1., pp. 42, 312, 521, vol. 2, pp. 87, 88. Thus in many instances we find the title given to judges and members of the bar: see the title pages to Staundforde's Pleas of the Crown, Davis' Pleas of the Crown, Jones' Reports, ed. 1693; Bulstrode's Reports; Ventris' Reports, ed. 1704. (1) It was also sometimes given to women: The Paston Letters, vol. 1, p. 533, vol. 2, p. 81 (A.D. 1460). About the time of Elizabeth the parochial clergy of the Church of England had the prefix of "sir, master," or "mister" attached to their names: Peacock's Church Furniture, pp. 66, 75, 90, 133, 149, 169: The Paston Letters, vol. i., p. 227; North's Chronicle of the Church of St. Martin in Leicester, p. 206, note; Shakespeare's Merry Wives of Windsor, As You Like It; Church Registers of Allhallows Barking. Indeed, it was not until within recent times that the use of "reverend" was met with as the distinctive title of a class, or otherwise than as an epithet of respect: see title page of Sermons by Dr. Richard Symes, D.D., 1640. Thus, in a Collection of Sermons preached before the House of Commons in the reign of Charles II., the names of the preachers are given, but before none of their names is the title "reverend" to be found. It is also to be noticed that the title was adopted by the Presbyterians quite as early as by the Church of England. For example, instances are to

(1) See also the title-page to Fitzherbert's Natura Brevium.

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be found in the early years of the eighteenth century where it was applied by the Church of Scotland to the synod and to the moderators and clergy of that Church. The first authentic instance that has been found of its occurrence before the name of any clergyman of the Church of England merely as a mark of his clerical status is about the date of 1732. If, then, the use of the epithet for the purpose of distinguishing persons in holy orders of the Church of England from the laity is so recent, great support is given to the contention that even at the present day it cannot be exclusively appropriated to them. In fact, whatever usage there is on the point leads to the conclusion that the title may be lawfully used by the ministers of other churches and of other denominations as well as by the clergy of the Church of England. Thus it is an ordinary practice for the Wesleyan, Roman Catholic, and Presbyterian ministers appointed to officiate as chaplains in the army to be styled "reverend." So, also, in communications to Wesleyan ministers from the secretary of state for war, the commissioners of the Admiralty, and the officials of other departments of state a similar practice prevails. Moreover, the right of Nonconformist ministers to the title has been recognized by the Court of Probate, the Court of Divorce and Matrimonial Causes, and even by the late Prerogative Court of Canterbury. Again, numerous instances can be adduced, both in the southern and northern provinces, in which this very word "reverend" appears on the tombstones of Wesleyan ministers buried in parochial churches. Thus, in twelve parishes in the province of Canterbury no less than forty-seven instances occur, one of which is in the diocese of Lincoln. In the province of York, and scattered over twelve parishes, are to be found twenty-four instances. If it is the case that the incumbents of parochial churches are responsible for the legality of every inscription in the churchyards of their parishes, why is it that so many inscriptions are allowed to exist which, if the conclusion of the learned judge of the court below be correct, ought never to have been put up? The discretion with regard to the propriety of inscriptions on the tombstones in the churchyard of his parish vested in the vicar, must be a judicial and not an unlimited discretion; it is clearly a wrong exercise of that discretion to refuse to allow, as in this case,

what is no more than the ordinary description of the person buried.

Cur. adv. vult.

July 31. SIR ROBERT PHILLIMORE. This is an appeal from the consistory of Lincoln. The subject of the appeal is the refusal of that Court to grant a faculty for the erection of a tombstone containing the following inscription:—"In loving memory of Annie Augusta Keet, the younger daughter of the Rev. H. Keet, Wesleyan Minister, who died at Owston-Ferry, May 11th, 1874, aged 7 years and 9 months. Safe sheltered from the storms of life."

It appears that the inscription "Wesleyan minister" was not objected to by the incumbent, and was allowed by the Court. The prefix "reverend" was objected to by the incumbent, and disallowed by the Court. I must express regret that the petitioner should not have been content with the description, "Wesleyan minister;" it is, strictly speaking, his accurate description, as George Edward Smith, clerk or vicar, would be, strictly speaking, the accurate description of the incumbent.

The aspect of the question in this Court is slightly varied from that which it assumed in the Court below. The Chancellor of Lincoln declined to allow the issue of a citation to the incumbent calling upon him to shew cause why the faculty prayed should not be granted. In this Court, however, that citation has, according to its usual practice, already issued, and has been served upon the incumbent, and he has not appeared in answer to the citation, but he has not withdrawn his opposition to it. The law as to the rights of the incumbent and parishioners with respect to gravestones in churchyards is often but partially understood and carelessly stated. I will endeavour to lay it down correctly. The churchyard is the freehold of the incumbent, subject to the right of the parishioner, or stranger happening to die in the parish, to simple interment, but to no more. Indeed, the incumbent has the right to pasture animals which do not injure the bodies interred in the churchyard, and every gravestone, of course, interferes with that pasturage.

The incumbent for this, as well as for other more important reasons, has a primâ facie right to prohibit altogether the placing

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of any gravestone, or to permit it upon proper conditions, such as those which relate to the size and character of the stone, the legality or propriety of the inscription upon it, on the payment of a proper fee. Usage indeed has much favoured the placing of such stones, and as a general rule the incumbent permits them; while the exercise of his right of refusal has become, or perhaps always was, subject to the control of the ordinary.

None of my predecessors was, I think, better acquainted with the mixed law and practice of the Ecclesiastical Courts in cases of this description than Sir Herbert Jenner Fust. In the important case of *Breeks* v. *Woolfrey* (1) he drew a clear distinction between the general right of the incumbent to refuse permission to place a gravestone and his right to refuse such permission on the ground that the inscription upon it was contrary to law; and while upon the latter special ground he overruled the refusal of the incumbent, he was careful to allow no interference with the right of the incumbent to refuse according to the general law his consent.

And here I should observe that the two legal positions, namely, that simple interment is a matter of right and the placing a gravestone a matter of permission, are in no way affected by the fact to which I was referred, and which is unfortunately too true, that inscriptions of an improper, ludicrous, and heathen character are to be found in some of our churches and churchyards. Such a fact only proves the culpable indifference and carelessness in this respect of those who had the control of the church and churchyard at the period when the censurable inscription was allowed, not that there was no power in the clergyman or the ordinary to refuse them. The notion that an incumbent is bound to permit an inscription at variance with religion, morality, or propriety is entirely erroneous, and not the less mischievous, because the law holds that tombstones once lawfully erected become, in a sense, the property of the persons who erected them: *Spooner* v. *Brewster*. (2) Passing, then, from the consideration of the rights of the incumbent and parishioners, I approach the examination of the law with respect to the power and authority of the ordinary, to whom application for a faculty must be made. With respect to the grant or refusal of a faculty, two distinct

(1) 1 Curt. 880. (2) 3 Bing. 136, 139.

considerations occur. First, is the object lawful? Secondly, is it expedient?

If the former question be answered in the negative, the second, of course, need not be entertained; but if the former question be answered in the affirmative, it may, nevertheless, well be that, having regard to circumstances, the ordinary may think the grant of a faculty inexpedient, and on that ground alone refuse it.

It is a mistake, therefore, to suppose that when the petitioner for a faculty has shewn that the object for which he required it is not illegal, that he is necessarily entitled to it.

The industry of counsel has brought to the attention of the Court a considerable number and variety of instances in which the epithet "reverend" has been applied, both by authors generally and occasionally by writers of epitaphs, to distinguish persons of the laity not in holy orders, and sometimes to remarkable women. What is the argument built upon this historical fact? It can only be that the title is one which is not peculiar to the ministers of any religious body, and which cannot be claimed by any such ministers as their special designation. The judge, the statesman, the officer in the army or navy, any ordinary gentleman, or indeed gentlewoman, might, upon this hypothesis, claim to have this prefix to their name, and nobody would be injured thereby. But is this really and honestly the ground on which the petitioner rests his claim? Is it not obvious that in the present case the title "reverend" is not claimed because everybody is entitled to it, but because the claimant is desirous of having it recorded that he is specially entitled to it as being a Wesleyan minister? I have no doubt that the Wesleyan minister in this case would conscientiously and honourably admit this to be so.

Instances were also adduced in which ministers of state had addressed Wesleyan ministers with the superscription of "reverend," and if the question were simply one of social status or general etiquette, this reference would be very pertinent and proper.

But the case is surely different when the question relates to the alleged obligation of the clergyman to confer, by a permanent inscription in his own churchyard, upon another person that peculiar religious title by which he alone has been hitherto designated and known to his own parishioners and his own Church.

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It has been argued, indeed, that there was a time when the clergyman was not addressed by the title of reverend, but by some other title of distinction. It is not, however, denied that this title has been accorded to them for more than two centuries; whereas I am informed by counsel that previously to 1811 the assumption of the title in dispute by a Wesleyan minister was absolutely forbidden by the rulers of the Wesleyan body. I do not, however, think that the Court has simply to decide whether the prefixing the title "reverend" to the description "Wesleyan minister" be so clearly illegal, that, even if the clergyman consented, the Court ought to prohibit it.

I do not pronounce an opinion to that effect; but it is the duty of the Court to consider not only whether it would be lawful in the abstract, to allow such an inscription as this, but also whether it be expedient and proper to do so. This consideration sometimes must, and often may, depend upon local circumstances of which the bishop is by reason, law and practice, the fittest judge.

I have heard it frequently stated by my immediate and distinguished predecessor in this chair (Dr. Lushington) that in all questions of faculty great weight ought to be ascribed to the opinion of the bishop of the diocese. Now, in the present case, the bishop has deliberately and emphatically expressed an opinion adverse to the prayer of the petitioner.

The bishop in his letter to the petitioner says:—[The learned judge here read the letter of the 16th of July, 1874, set out in the petition]. I do not think that it would be proper or consonant to practice that this Court should overrule not only the direct dissent of the incumbent but also the deliberate judgment and authority of the bishop in a matter not of strict law applicable to all cases, but of discretionary permission applicable to the particular case; and I think that in refusing to do so I act in accordance with the spirit both of the general law and of those rubrics in the Book of Common Prayer which relate to the authority of the ordinary.

I decline to issue the faculty as now prayed.

Proctor for appellant: *Brooks.*

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THE DUKE OF SUTHERLAND. (6602.)
THE FANNY M. CARVILL. (7052.)

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Jan. 19.

Damage—Regulations for preventing Collisions at Sea—Construction of the 17th section of the Merchant Shipping Act Amendment Act, 1873 (36 & 37 *Vict. c.* 85).

The 17th section of the Merchant Shipping Act Amendment Act, 1873, enacts: "If in any case of collision it is proved that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary:—

Held, that this section applies only to cases of collision where there has been a material infringement of the regulations which by possibility might have caused or contributed to the collision.

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THIS was a cause of damage, instituted on behalf of the company styled the "Wisby Skepps Roderi Bolag," of Wisby, Sweden, the owners of the barque *Eugenie*, against the steamship *Magnet*.

The petition alleged in substance as follows:—

At about 0·30 a.m. on the 15th day of November, 1874, the Swedish barque *Eugenie*, of 398 tons English measurement, in charge of a pilot, whilst on a voyage from Liverpool to Buenos Ayres, was about four or five miles to the eastward of the North-West Lightship.

The wind at such time was about north-west by west, a strong breeze. The tide was flood, and of the force of about one knot and a half per hour, and the weather was dark and rainy, and the *Eugenie* was sailing close hauled by the wind on the port tack, heading about north by east, and proceeding at the rate of about eight knots per hour. Her proper regulation lights were duly exhibited and burning brightly, and a good look-out was being kept.

At such time the masthead and green lights of two steam vessels, about a quarter of a mile apart, were seen at the distance of about two miles from the *Eugenie*, and bearing broad on her port bow. The *Eugenie* was kept close hauled by the wind on the port tack, and the headmost of the said steamers passed clear ahead of her, but the sternmost one, which proved to be the above-named screw steamer *Magnet*, instead of taking proper measures for keeping out of the way of the *Eugenie*, improperly attempted to pass ahead of her, and rendered a collision inevitable, and although the helm of the *Eugenie* was put up to ease the blow,

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the *Magnet* with her starboard side came into violent collision with the port bow of the *Eugenie*.

The *Magnet* improperly neglected to keep out of the way of the *Eugenie*.

The *Magnet* improperly attempted to go ahead of the *Eugenie*.

The *Magnet* did not duly observe and comply with the provisions of Article 16 of the Regulations for Preventing Collisions at Sea.

The said collision was occasioned by the negligent and improper navigation of the *Magnet*.

The said collision was not occasioned or contributed to by any negligence on the part of those on board the *Eugenie*.

The solicitors for the owner of the *Magnet*, brought in an answer, which was in terms substantially as follows:—

The *Magnet* is a screw steamer of 378 tons. A little before 0·40 a.m. on the 15th day of November, 1874, the *Magnet* was proceeding in the prosecution of a voyage from Dublin to Liverpool between the North-West Lightship and the Bar Lightship.

There was a fresh breeze from the W.N.W., with thick cloudy weather and showers of rain, and a heavy sea was running. The *Magnet* was proceeding at full speed, heading about east south-east, having her regulation lights duly exhibited and burning brightly, and a good look-out being kept on board her.

At the time and under the circumstances aforesaid those on board the *Magnet* observed a faint glimmer or reflection of a ship's light a little on the starboard bow of the *Magnet*, but it immediately disappeared. The master of the *Magnet* supposed the light to be the light of a vessel proceeding in the same direction as the *Magnet*, and yawing in the heavy sea, and he ordered the helm of the *Magnet* to be starboarded, and the course of the *Magnet* was altered about a point under the starboard helm.

When this had been done the port light of a vessel, which proved to be the *Eugenie*, suddenly opened out close to the *Magnet* on her starboard bow. The helm of the *Magnet* was immediately put hard a starboard, but it was too late to avoid a collision, and the two vessels came into contact, the bowsprit of the *Eugenie* striking the *Magnet* on her starboard side at the fore part of the bridge. The *Eugenie* dragged along the starboard side of the *Magnet*, tearing away the rails, bulwarks, and davits of the *Magnet*, and causing other damage to her.

The *Eugenie* neglected to have her side-lights properly exhibited, according to the regulations in force for preventing collisions at sea, and was in fault for such neglect.

The said collision was occasioned by the negligence of those on board the *Eugenie*.

The said collision was not occasioned or contributed to by any negligence of those on board the *Magnet*.

The allegations contained in the petition, save as admitted by this answer are denied.

The case was heard on the 18th and 19th of December last on oral evidence before the judge, assisted by two of the elder brethren of the Trinity Corporation. On behalf of the owner of

the *Magnet* evidence was offered to shew that the side lights of the *Eugenie* were not in accordance with the regulations, and after the evidence had been given the Court requested the elder brethren to inspect the side lights of the *Eugenie* and to examine the vessel. The result of the evidence and the substance of the report of the elder brethren appears from the judgment.

Butt, Q.C., and *E. C. Clarkson*, appeared for the plaintiffs.
Milward, Q.C., and *G. Bruce*, for the defendant.

THE COURT pronounced that the *Magnet* was to blame.

The question whether the *Eugenie* was not also to blame under the provisions of the 17th section of 36 & 37 Vict. c. 85, was then argued by counsel.

The following authorities were referred to: *The Hibernia* (1); *The Amalia* (2); *The Halley* (3); *The Guldfaxe* (4); *The Explorer*. (5)

Cur. adv. vult.

THE DUKE OF SUTHERLAND.

THIS case arose out of a collision which occurred on the morning of the 23rd of August, 1873, off Holyhead, between the *Maggie Trimble*, an iron ship of 786 tons, and the steamship *Duke of Sutherland*.

The solicitors for the plaintiffs, the owners of the *Maggie Trimble*, alleged in the petition substantially as follows:

On the 23rd of August, 1873, the *Maggie Trimble* left Liverpool bound for Valparaiso with a cargo of coal.

At thirty minutes a.m. on the following day, the 24th of August, the said ship was off Holyhead, proceeding on her said voyage under easy sail, heading S.W. by S., her regulation lights being duly exhibited and burning brightly, and a good look-out being kept on board her. The wind was a moderate breeze from the S.E., and the night was fine, but dark, with a slight haze.

At such time, those on board the *Maggie Trimble* observed, about four points on her starboard bow, at a distance of about three miles, a bright light, which proved to be the masthead light of the *Duke of Sutherland*, and soon afterwards the red side-light of the *Duke of Sutherland* came into view.

(1) 2 Asp. Mar. Cas. 454.
(2) Br. & Lush. 151.
(3) Law Rep. 2 P. C. 193.
(4) Law Rep. 2 A. & E. 325.
(5) Law Rep. 3 A. & E. 289.

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The *Maggie Trimble* was kept on her course, but the *Duke of Sutherland* approached her under a port helm so as to render a collision inevitable. The helm of the *Maggie Trimble* was thereupon put hard down in order to ease the blow, but the *Duke of Sutherland* with her port paddle-box struck with great violence the starboard side of the stem and starboard bow of the *Maggie Trimble*, doing considerable damage.

Those on board the *Duke of Sutherland* neglected to keep a proper look-out.

The *Duke of Sutherland* improperly neglected to keep out of the way of the *Maggie Trimble*.

The *Duke of Sutherland* improperly ported her helm.

The *Duke of Sutherland* improperly neglected to stop and reverse her engines.

The aforesaid collision and the damages and losses consequent thereupon were caused by the negligence and improper navigation of the *Duke of Sutherland*.

No blame in regard to the aforesaid collision is attributable to the *Maggie Trimble*, or to anyone on board of her.

The following answer was filed on behalf of the owners of the *Duke of Sutherland* :—

The *Duke of Sutherland* is a paddle-wheel steamer of 409 tons and 270-horse power, and is manned by a crew of twenty-six hands all told.

The *Duke of Sutherland*, at 7.30 p.m. on the 23rd day of August, 1873, left Dublin bound for Holyhead, having on board a general cargo of cattle and 110 passengers.

The *Duke of Sutherland* proceeded on her said voyage without accident until shortly before 12.50 a.m. on the 24th day of August, 1873. At that time the *Duke of Sutherland* was in St. George's Channel, the South Stack bearing about S.E. by S., five or six miles distant. The wind was then blowing a fresh breeze from the E. by S., the tide was ebb, and running about two and a-half knots. The *Duke of Sutherland* was then steering her course for Holyhead S.E. by E. ½ E., her speed being about twelve knots; her regulation lights duly exhibited and burning brightly, and a good look-out being kept on board her.

In those circumstances those on board the *Duke of Sutherland* observed three bright lights about four points on the port bow of the *Duke of Sutherland*, and took them to indicate a vessel in tow of a steamer going the other way, and while examining them made out that they were being carried by a ship under sail, which turned out to be the *Maggie Trimble*. The *Maggie Trimble* was then close under the port bow of the *Duke of Sutherland*, but no other lights were sighted on board the *Maggie Trimble*, which was heading S.S.W., or thereabouts. The helm of the *Duke of Sutherland* was put hard a-port as soon as the *Maggie Trimble* was seen to be a sailing vessel, but immediately afterwards the *Maggie Trimble* ran into the *Duke of Sutherland*, the cutwater of the *Maggie Trimble* striking the spring beam of the after port sponson of the *Duke of Sutherland*, and doing considerable damage.

Save as herein appears, the defendants deny the several allegations of the petition.

The *Maggie Trimble* did not carry the lights required by law.

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The *Maggie Trimble* carried lights other than those allowed and required by law.

Those on board the *Maggie Trimble* neglected to take the proper measures in due time to warn those on board the *Duke of Sutherland* of the proximity of the *Maggie Trimble*.

The aforesaid collision between the *Maggie Trimble* and the *Duke of Sutherland* was wholly occasioned by the improper navigation of the *Maggie Trimble*, and other negligence of those on board that vessel.

The aforesaid collision was not occasioned by any negligence of those on board the *Duke of Sutherland*, but was, so far as they were concerned, an inevitable accident.

The case was on the 15th of January last heard on oral evidence before the judge, assisted by two of the elder brethren of the Trinity Corporation.

Milward, Q.C., and *G. Bruce*, appeared for the plaintiffs.

Butt, Q.C., and *J. P. Aspinall*, for the defendants.

It was proved by witnesses, called on behalf of the owners of the *Duke of Sutherland*, that at the time of the collision the side-lights of the *Maggie Trimble* were so fixed that the catheads obstructed the range of the lights from right ahead to a point and a-half on either bow, but only in the plane of the catheads, so that the lights would be visible in accordance with the regulations to an observer stationed either above or below the level of the cat heads. It was also proved that since the collision the position of the side-lights of the *Maggie Trimble* had been altered by one of the Surveyors of the Board of Trade.

The Court found on the evidence that the starboard light of the *Maggie Trimble* was open and visible to those on board the *Duke of Sutherland* a sufficient time before the collision to afford opportunity to the *Duke of Sutherland* to keep out of the way of the *Maggie Trimble*. The Court held, also, that if those on board the *Duke of Sutherland* saw other lights and did not understand what they were it was their duty to have slackened speed. The Court therefore pronounced the *Duke of Sutherland* to blame, but took time to consider whether the *Maggie Trimble* was not also to blame.

Cur. adv. vult.

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THE FANNY M. CARVILL.

THE MAGNET.

THIS was a cause of damage brought for the recovery of damages sustained in a collision between the Swedish barque *Peru* and the barque *Fanny M. Carvill*, on the night of the 18th of November, 1874.

The petition of the plaintiffs, the owners of the *Peru*, and the owners of the cargo, alleged in substance as follows:—

Shortly before 9.30 p.m., on the 18th of November, 1874, the barque *Peru* of 589 tons, navigated by her master and a crew of fourteen hands, was about fifteen miles distant from Beachy Head, which bore about N.N.W., and was proceeding in the prosecution of a voyage from the Tyne to Monte Video, laden with coals.

The wind was then about W.N.W., the tide was flood, and of the force of about a knot an hour, the weather was fine, clear, and moonlight, and the *Peru*, under topsails, mainsail, foresail, jib, foretopmost staysail, and spanker, was sailing close-hauled on the starboard tack, heading S.W., and making about three knots an hour, with her proper regulation lights duly exhibited and burning brightly, and with a good look-out being kept from on board her.

At this time, and under these circumstances, the green light of a vessel, which afterwards proved to be the above-named vessel *Fanny M. Carvill*, was seen at the distance of about a mile and a-half, and bearing about two points on the port bow. The *Fanny M. Carvill* was on the port tack, and the *Peru* was kept close-hauled by the wind on the starboard tack, in the expectation that the *Fanny M. Carvill* would keep out of her way, as she ought to have done; but the *Fanny M. Carvill* approached, and although loudly hailed from the *Peru*, ran into and struck the *Peru* upon the port side, about midships, and did her so much damage that she was compelled to proceed to the Downs, and afterwards to be towed to London for repairs.

A good look-out was not kept on board the *Fanny M. Carvill*.

The *Fanny M. Carvill* improperly neglected to take in due time proper measures for keeping out of the way of the *Peru*, and improperly neglected to keep out of the way of the *Peru*.

The said collision was occasioned by the improper navigation of the *Fanny M. Carvill* and the negligence of those on board her.

The said collision was not in any way occasioned by any negligence on the part of those on board the *Peru*.

On behalf of the owners of the *Fanny M. Carvill*, the following answer was filed:—

About 9.30 p.m. on the 18th day of November, 1874, the barque *Fanny M. Carvill*, of 592 tons register, and manned by a crew of twelve hands all told, whilst on a voyage from London to Barcelona with deals, was about fourteen miles off Beachy Head.

At such time there was a strong breeze from W. to W. by N., the weather was cloudy but clear on the water, and the tide was running to the westward,

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the *Fanny M. Carvill* was on the port tack, close-hauled under single reefed upper maintopsail, lower foretopsail, reefed foresail, foretopmast staysail, and mizen staysail, heading about N.N.W., and sailing at the rate of two and a-half knots per hour, the proper regulation sailing lights were duly exhibited and burning brightly, and a good look-out was being kept.

Under these circumstances the red light of a vessel, which afterwards proved to be the barque *Peru*, was seen about four points on the starboard bow of the *Fanny M. Carvill*, and distant about two miles. Almost immediately afterwards the green light of the *Peru* came into view. Those on board the *Fanny M. Carvill* continued to watch the *Peru*, which approached—showing both lights—broad on the starboard bow of the *Fanny M. Carvill*.

About ten minutes after the lights had been first seen, and while the two vessels were a considerable way apart, those on board the *Fanny M. Carvill* showed a flash light, and shortly afterwards the red light of the *Peru* was shut in, and the two vessels would have passed clear of each other, starboard side to starboard side, but, when within a short distance of the *Fanny M. Carvill*, the *Peru* shut in her green and again opened her red light, causing immediate danger of collision. Thereupon the helm of the *Fanny M. Carvill* was put hard a-port, and her mainyard squared, but she was unable to clear the *Peru*, and the two vessels came into collision the bluff of the port bow of the *Fanny M. Carvill* striking the *Peru* amidships on the port side, doing considerable damage to both vessels.

Those on board the *Peru* neglected to keep a good look-out.

Those on board the *Peru* improperly neglected to keep their course.

The lights of the *Peru* were improperly fixed and screened.

The said collision and the damage consequent thereon were occasioned by the improper and negligent navigation of those on board the *Peru*, and by the defective condition of the side-lights of the *Peru*.

The *Peru* was in fault within the true intent and meaning of the 17th section of the Merchant Shipping Act, 1873, for infringing the regulations for preventing collisions at sea, by neglecting to carry proper side-lights.

The aforesaid collision was not in any way occasioned by any negligence of improper navigation on the part of those on board the *Fanny M. Carvill*.

Save as herein appears the allegations contained in the petition are untrue.

The cause was heard on the 16th of January, last, on oral evidence before the judge, assisted by two of the elder brethren of the Trinity Corporation.

Milward, Q.C., and *E. C. Clarkson*, appeared for the owners of the *Peru*, and the owners of her cargo.

Butt, Q.C., and *R. E. Webster*, for the owners of the *F. M. Carvill*.

The master of the *Peru* was called as a witness on behalf of the plaintiffs, and gave evidence as follows:—

Where are the lights fixed in your ship?—They are fixed about abreast of the windlass, after part of the forecastle.

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And were the screens—how did the screens run, the shade or screen?—Run parallel with the keel.

How far forward did the screens go?—They would be eight feet before the fore rigging.

That is not quite the question. We want you to tell us, captain, how far they ran from the light forward; from the light, the length of the screen?—2 ft. 5 in.

Is there any reason why it is not longer?—Because, if it should be longer, it would go outside the bow and the seas would take it away.

Now then, describe to me with regard to the cathead, where your lights are; how far abaft the cathead? You know the cathead?—Yes, sir; I think about seven or eight feet aft of the cathead.

Would that be on the bluff of the bow, then—on the round of the bow, the bluff of the bow?—Just as the round commences.

And do I understand you to say that the reason your screens were not longer was that they would have come to where the bow falls away—rounds?—Yes.

And so would have projected beyond the side and the lights would have been liable to be washed away?—Yes.

That might have been a very good reason for putting them a little further back, might it not?—No, I could not get them further back.

Why?—Because of the standing gear at the after part of the rail.

You might have fixed them somewhere else?—I fixed them in the best place I could.

You know by law you are required to have the screens not less than three feet, do you not. That is your law as well as ours?—Yes.

Not less than three feet?—Yes.

Then I may take it, I suppose, that the right thing if you can do it is to have the screens three feet from the light?—Yes, I could not have them longer.

SIR ROBERT PHILLIMORE. I am of opinion that the *Peru*, a starboard-tacked vessel, continued on her course without alteration up to the time of the collision; that it is untrue, as stated by the witnesses on the part of the *Fanny M. Carvill*, that the *Peru* ever came right up into the wind two and a half points with her sails flat aback.

I am of opinion that the green light of the *Peru* was not seen across the bow of the *Peru* by those on board the *Fanny M. Carvill*, and did not lead to the collision. The *Fanny M. Carvill* was aware that the *Peru* was a starboard-tacked vessel, and as the *Peru* never altered her bearings, the *Fanny M. Carvill* must have known that both ships keeping their courses must have come together. I think the *Fanny M. Carvill* waited too long before she got out of the way of the *Peru*. Whether, on account of the deficiency of the screens, the *Peru* is also to blame under the statute is a question

which I reserve till the judgment is given on Tuesday in the *Magnet*. 1875

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Cur. adv. vult.

Jan. 19. SIR ROBERT PHILLIMORE. The first question which I have to decide as affecting the cases of the *Magnet*, the *Duke of Sutherland*, and the *Fanny M. Carvill*, is the true construction of a clause in the last Merchant Shipping Act. It is necessary to consider the previous enactments on the subject. By 17 & 18 Vict. c. 104, s. 298, it was enacted, "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights, or the use of fog signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." The next enactment on the subject was 25 & 26 Vict. c. 63, s. 29: "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary." The next enactment on the subject was 36 & 37 Vict. c. 85, s. 17: "If in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary."

It has been contended that any infringement of any regulation

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made under the authority of the statutes compels the Court to pronounce the vessel which is guilty of such infringement to be in fault, unless the infringement was in the circumstances necessary, that is to say, that a vessel carrying a perfect starboard light, and run into on the starboard side by a vessel which ought to have avoided her, is nevertheless in fault if she have no port light, or a deficient one; or that a vessel ahead of another, which overtakes her and runs into her stern, is nevertheless in fault if she has deficient or no side lights, although her side lights, if properly exhibited, could not possibly have been seen by, or have in any way affected, the overtaking vessel. I say nothing as to the injustice of applying such a construction of the English statute to foreign vessels, but, irrespective of any such consideration, I decline, as at present advised, to put a construction which appears to me fraught with absurdity and injustice upon the statute, even with respect to British vessels. I think the infringement spoken of must mean an infringement not indeed necessarily causing the collision, but connected with it—an infringement material to the case and by possibility causing or contributing to it; not an infringement wholly immaterial to the case, and which by no possibility could have anything to do with the collision. I do not think that this construction of the statute is at variance with the decision of the Privy Council in *The Hibernia* (1), which I have carefully perused.

And here it may be convenient to say a word on the legal effect of instructions given by the Board of Trade to their surveyors—a matter much discussed before me in cases of this description. Such instructions may be prudent and proper, though it appears that they are frequently changed; but except in so far as they are authorized by statute they can have no binding effect upon English, much less upon foreign, vessels. The regulations are of a different character, and being adopted by foreign states, have by virtue of treaties or conventions an international obligation.

There are three cases now before the Court in which I have reserved for consideration the construction of the statute. I now proceed to apply to them the provisions of the statute construed upon the principles which I have stated. The first is *The Magnet*,

(1) 2 Aspinall, Mar. Law Cas. 454.

the second *The Duke of Sutherland*, the third *The Fanny M. Carvill*. In these cases I have condemned one vessel, the question as to the culpability of the other being reserved. 1875 THE MAGNET

The Magnet was a case of collision between the Swedish barque the *Eugenie* and the *Magnet*, an Irish screw steamer, which happened off the entrance to the port of Liverpool, somewhere between the North-West and the Bar lightships, between twelve and one o'clock in the night of the 15th of November last. The *Eugenie* was heading N. by E., close-hauled on the port tack, going at a speed of about eight knots an hour. The *Magnet* was proceeding at full speed, about ten knots an hour, heading E.S.E. They were crossing ships.

The pilot of the *Eugenie* saw the white light of the *Magnet* four or five miles off, five points on his port bow, and then he saw the masthead and green lights of two vessels, both on his port bow, a quarter of a mile apart. He kept on his course. The foremost of the steamers passed clear ahead of him, but the sternmost, which was the *Magnet*, starboarded shortly before the collision, and came with her starboard side into the port bow of the *Eugenie*.

The defence of the *Magnet* is that she only saw the faint glimmer of a ship's light two points on her starboard bow, that it did not continue in sight, and a red light opened out almost alongside of her. The master of the *Magnet* supposed, he says, the vessel to be going in the same direction as he was, ahead of him, and by yawing to have shewed her light. He ordered starboard, first a little, and then hard a-starboard. The answer on behalf of the *Magnet* stated that the *Eugenie* neglected to have her side-lights properly exhibited according to the regulations. At the hearing, two points were discussed; first, whether the red light of the barque was visible at a sufficient distance to apprize the steamer that she ought to get out of her way. This point I decided in the affirmative, and adversely to the *Magnet;* which I therefore hold to be in fault for the collision. The second point is, whether the *Eugenie* was not also in fault under the provisions of 36 & 37 Vict. c. 85, s. 17, for having violated the sailing rules, by not carrying proper lights properly placed.

It was not denied by the counsel for the *Magnet* that the lamps were of the proper size, but it was contended that they were not

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fitted with proper magnifying and reflecting power, and that they were not of proper capacity. Scientific evidence was produced on this point; but the captain of the *Magnet* admitted that when he saw the red light it was a very good light, and that both lights burnt well. The second mate said he saw no difference between them and any other lights. And the captain of the *Eugenie* swore that when on board the *Magnet*, after the collision, he saw them more than two miles; while none of the witnesses produced in behalf of the *Magnet* were interrogated as to whether the lights of the *Eugenie* were not burning brightly after the collision. It was further contended that the lights which were on the fore part of the mizen rigging, on the channel boards, and level with the rail, were not so placed so as to be visible according to the regulations, because they were abaft the broadest part of the ship, and were obscured by the fore-topmast backstay, and because a dead eye came before the lens of the lamp.

There was some argument respecting the length of the screens which, I think, was not insisted upon.

With regard to the obscuring of the lights, there was a conflict of scientific and positive testimony. After some consideration and conference with the Trinity Masters, I determined on putting into execution the authority which the statute (1) gives me, requesting them to inspect the ship and make the proper experiments for ascertaining whether the lamps were of a proper character, to be visible at a proper distance, and whether they were not obscured by any part of the rigging. In taking that course I may have given too favourable a construction to the pleading of the *Magnet*, in which the question as to the position of the lamps was perhaps not raised with sufficient distinctness.

The Elder Brethren have reported "that having been requested by me to report on the sufficiency of the side-lights of the *Eugenie*, and to examine the said vessel for the purpose of ascertaining whether there is anything in her construction, or in the position of her tackle or furniture which would prevent the said lights from being seen when placed in their respective positions, we proceeded to Long Reach on the afternoon of the 30th ultimo, and anchoring a vessel abreast the lower mile mark, made arrangements whereby

(1) 24 Vict. c. 10, s. 18.

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we could accurately fix the range of the light. The evening was starlight, clear overhead, and perfectly calm, but hazy over the water: at 6 p. m., it being quite dark, the *Eugenie's* lights were placed in each quarter of the vessel so stationed; we proceeded in a boat up the reach, with the reflectors of the lights turned directly upon us, thereby giving every advantage to the *Eugenie*, when the green light disappeared to the naked eye at half a mile, and the red light at a cable's length short of the mile. Upon a perfectly clear night we are of opinion that the green light might have been seen a quarter, and the red light half, a mile further.

"The lights of the *Eugenie* have been tested as to their photometric power with the following result:—

"Naked flame	3·1 candles.
"Ditto, aided by the reflector . .	9·0 „
"Power of light with red shade .	1·1 „
"Ditto, with green ditto . .	0·2 „

which, in our opinion, is considerably less than the lanterns now in use, and perfectly inefficient.

"Having received information from the Registrar that the *Eugenie* would be ready for our inspection on the 12th instant, we proceeded to Liverpool on the 11th, and visited the vessel on the following morning, when the screens were placed in their regular positions, and the distance across the ship, from light to light, was found to be exactly twenty-four feet at a corresponding height above the water abreast the fore-topmast backstays; the width across the ship from backstay to backstays was found to be 24 ft. 6 in., shewing that an obstruction of three inches intervenes on each side directly in front of the lights."

Adding to the evidence already before me the report of the Trinity Masters, and considering the whole evidence together, I must pronounce the *Eugenie* to be also, in the language of the statute, in fault for non-observance of the regulations respecting the sufficiency of lights.

With respect to the case of *The Duke of Southerland*, it was not, I think, contended that the lamps were not so constructed and of such a character as to comply with the regulations. The dispute was as to their position. The Board of Trade surveyor required

1875 their position to be altered; this may have been prudent, but I am
THE MAGNET. not satisfied upon the evidence that the lights were previously so fixed as to infringe the regulation with respect to their visibility. I pronounce, therefore, the *Duke of Sutherland* alone in fault.

With respect to the case of *The Fanny M. Carvill*, the evidence was that the screens projected 2 ft. 5 in. instead of 3 feet. The object of the regulation with respect to screens is to prevent the side-lights from being seen across the bow; for this purpose it directs the screens to project at least three feet. It is, so to speak, a subsidiary regulation for the purpose of securing the visibility of the distinct light; the general visibility of the lights being already provided for in the former regulations.

I have stated in my former judgment that I am satisfied the green light was not seen across the bow of the *Peru* by those on board the *Fanny M. Carvill;* and, according to the evidence, if the length of the screens in the *Peru* had extended further outside of the bows a sea might have washed them away. Upon the whole, I think that I am not compelled to say that the deficiency in the length of the screens was an infringement of the regulation according to my construction of the statute; and, that, therefore, the *Peru* is legally in fault for a collision, which her non-observance of the regulations certainly did in no way occasion. I pronounce the *Fanny M. Carvill* alone in fault.

Solicitors for owners of the *Eugenie: Bateson & Co.*
Solicitors for owner of the *Magnet: Jenkins, Rae, & Jenkins.*
Solicitors for owners of the *Maggie Trimble: Wood & Tinkler.*
Solicitor for owners of the *Duke of Sutherland: Roberts.*
Solicitor for owners of the *Peru* and of her cargo: *Cooper.*
Solicitors for owners of the *F. M. Carvill: Stokes, Saunders, & Stokes.*

THE EARL SPENCER. (7061.)

1875
Feb. 18.

Regulations for preventing Collisions at Sea—Art. 17—*No Obligation to exhibit any other than the Regulation Lights—Rejection of Evidence on mixed Question of Law and nautical Skill.*

In a case where a sailing vessel under way, with her regulation lights properly exhibited, was overtaken and run down by a steamer at night, it was held that no blame attached to the sailing vessel for not exhibiting a light over her stern.

THIS was a cause of damage instituted on behalf of the owners, master, and crew of the schooner *Merlin*, and on behalf of the owners of the cargo lately laden on board thereof, against the steamship *Earl Spencer* and her owners.

The petition alleged in substance as follows:—

About 5 a.m. on the 17th day of October, 1874, the *Merlin*, whilst in prosecution of a voyage from Carmarthen to Liverpool, with a cargo of tin plate, was in Holyhead Bay, inside of the breakwater.

The wind at such time was about south-south-west, a moderate gale; the weather was rainy, and the tide was about one hour and a half ebb, and the *Merlin* had her proper regulation lights duly exhibited and burning brightly. She was on the starboard tack, heading about south-east-by-south; her speed was about one knot and a half to two knots per hour, and she was under double-reefed mainsail, reefed topsail, standing jib, and a forestaystail, and her crew were engaged in setting her double-reefed foresail.

At such time the *Earl Spencer*, with her three lights open, was seen at the distance of about a cable's length astern of the *Merlin*, and coming towards her under steam. The *Earl Spencer*, although loudly hailed from the *Merlin*, ran against and with her stem struck the *Merlin* a violent blow on her port quarter, doing her a great deal of damage.

Those on board the *Earl Spencer* neglected to keep a proper look out.

The *Earl Spencer* improperly neglected to keep out of the way of the *Merlin*.

The *Earl Spencer* was going too fast, considering the state of the weather, and did not duly observe and comply with the provisions of Article 16 of the regulations for preventing collisions at sea.

The said collision, and the consequent loss of the *Merlin*, and her cargo, and everything on board her, were occasioned by the negligent and improper navigation of the *Earl Spencer*.

The said collision was not occasioned by any negligence on the part of the master or crew of the *Merlin*.

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The answer alleged in substance as follows:—

The *Earl Spencer* left Greenore, bound for Holyhead, on the evening of the 16th day of October, 1874.

The *Earl Spencer* proceeded on her said voyage in safety until about 4.25 a.m. on the 17th day of October, 1874, when the tide being ebb, the weather dark and rainy, and a gale blowing from the south-south-west, the *Earl Spencer* was rounding the breakwater of and entering Holyhead outer harbour, heading about south-half-east, with her regulation lights burning brightly, and a good look out being kept on board of her. At such time and after rounding the breakwater, those on board the *Earl Spencer* suddenly sighted a vessel which turned out to be the *Merlin*, with no lights visible, bearing about half a point on the starboard bow of the *Earl Spencer*, and close ahead of the latter vessel, and inside the breakwater. The master of the *Earl Spencer*, thinking that the *Merlin* was a vessel at anchor, starboarded the helm of the *Earl Spencer*, to go to the eastward and outside of her and of the other shipping, there being several vessels at anchor to the westward of the *Merlin*, but discovering immediately afterwards that the *Merlin* was under way, the master of the *Earl Spencer* ordered the engines of that vessel to be stopped and reversed full speed, which order was immediately obeyed; but the time which had elapsed from the sighting of the *Merlin* was so short, and as the *Merlin* was steering a course which crossed the course of the *Earl Spencer*, that latter vessel was unable to avoid the *Merlin*, but her bow came in contact with the stern and port quarter of the *Merlin*.

Save as herein appears the defendants deny the several allegations of the plaintiffs' petition.

Those on board the *Merlin* improperly omitted under the circumstances of the case to hail the *Earl Spencer*, or to shew a light, or to take any proper measures in due time to warn those on board the *Earl Spencer* of the proximity and position of the *Merlin*, although from the relative position of the two ships the regulation lights of the *Merlin* were not visible to those on board the *Earl Spencer*.

Those on board the *Merlin* neglected to observe and comply with the provisions of Articles 19 and 20 of the regulations for preventing collisions at sea.

The said collision was occasioned or contributed to by some or one of the acts or defaults set forth in the 5th and 6th articles of this answer, or otherwise by the negligence of those on board the *Merlin*.

The said collision was not occasioned by any negligence of those on board the *Earl Spencer*, but was, so far as they were concerned, an inevitable accident.

The case was heard on the 11th of February, 1875, on oral evidence by the judge, assisted by two of the Elder Brethren of the Trinity Corporation. It was admitted that the *Earl Spencer*, just before the time of the collision, was proceeding at the rate of eleven knots an hour, and that the *Merlin* did not shew any light over her stern. The master of the *Merlin* stated on cross-examina-

tion that if he had seen the *Earl Spencer* sooner than he did, he would have shewn a light over the stern of his vessel.

The master of the *Earl Spencer* was called as a witness on behalf of the defendants, and he gave evidence as follows:—

Until you saw this vessel I believe we shall be quite agreed you were going full speed?—Yes.

Is it your custom to go into the harbour full speed or not?—Yes, except when it is foggy.

On a dark night like this, and blowing?—Yes; if we did not go full speed when it was blowing she would not steer, she would not come up to the wind.

Did you advisedly keep her going full speed?—Yes.

Do the mail boats do the same?—I believe so.

At all events, do you consider it the right thing or not to go in at night at that speed?—I consider that I could not get in between the jetty and the graving dock if I did not keep way on the ship to steer her in, especially with a gale of wind blowing.

Where would you ease in a general way?—While I am in the act of turning round the mail boat jetty.

Well, how far is that from the end of the breakwater?—A mile exactly.

You would have carried on full speed until then?—Yes.

As a sailor and a commander of a steamship, was that, in your judgment, the right thing to do?—I always do it.

Do you judge that the right thing to do?—Yes, I do; otherwise I should not do it.

Captain Slaughter, a commander in the Royal Navy, who was the master of one of the mail-boats between Kingston and Holyhead, was also called as a witness on behalf of the defendants. The following question was put to him by the counsel for the defendants, and was ruled by the judge to be inadmissible:—

At what speed is it your custom to go into the harbour at night?

The examination of the witness by the counsel for the defendants then proceeded as follows:—

Have you had much experience of navigating with steamers at Holyhead Harbour?—Ten years, night and day, eight months out of the year.

Now I ask you, in your judgment, having had that experience, is it right or wrong to go in full speed?

SIR ROBERT PHILLIMORE. Do not answer that question; right or wrong, of course, is a question of law. The Elder Brethren are here to advise on questions of nautical law. The question is a mixed question, in my judgment, of nautical skill and of nautical law, and ought not to be allowed to be put.

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Milward, Q.C., and *E. C. Clarkson*, for the plaintiffs.

Butt, Q.C., and *J. P. Aspinall*, for the defendants. [They cited *The John Fenwick* (1); *The Chanonry*. (2)]

SIR ROBERT PHILLIMORE. The Court entertains no doubt whatever with respect to a portion of this case, namely, that the steamer is to blame for the very reprehensible speed at which, in the circumstances of this case, she thought proper to enter Holyhead Harbour. But on the other point the Court will take a little time to consider, and will deliver a reasoned judgment.

Cur. adv. vult.

Feb. 18. SIR ROBERT PHILLIMORE. The question reserved in this case is whether the *Merlin* be not to blame as well as the *Earl Spencer*—already pronounced to be to blame—because she, the *Merlin*, did not exhibit a light over her stern. I must consider this question with reference to the particular case and the general law.

First, as to the particular case. The Elder Brethren were careful to draw my attention to the fact that the crew of this little schooner were only four in number. That the master was engaged in steering and the three others in making sail, and in their opinion there was not time or opportunity to have exhibited a light over the stern. In this opinion I agree, but I am afraid I must also consider, secondly, what the general law is.

That law is to be found now exclusively in the regulations for preventing collisions at sea. The regulations carefully prescribe the occasions upon which lights are to be carried, and the character and position of those lights.

It is not denied that no express provision is to be found for the exhibition of a light to an overtaking vessel. The second article of the regulations rules that the lights mentioned in certain following articles and no others shall be carried in all weathers, from sunset to sunrise; and it is clear that the case of an overtaking vessel was in the contemplation of the framers of the regulations, for

(1) Law Rep. 3 A. & E. 500. (2) 1 Asp. Mar. Law Cases, 569.

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Article 17 says—"Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel;" and if it be ever the duty of the vessel overtaken to exhibit a stern light, here was surely the place where it would have been mentioned.

It is no secret that great nautical authorities are divided in their opinion on the subject of the advantage or disadvantage of exhibiting a stern light. It may be proper that a regulation to this effect should be made. I do not offer an opinion on the point.

The regulations having an international character, any change would of course require great consideration, caution, and communication with other states who are parties to the existing regulations, but until a new regulation be made it seems to me that to require a vessel about to be overtaken to exhibit a stern light would lead to confusion and danger. The necessity for exhibiting such a light would vary with the circumstances of each case: at least, I presume it would not be contended that the overtaking vessel would always be entitled to expect the exhibition of a light from the vessel ahead. The consequences would probably be that uncertainty would be introduced into the general matter of lights, and certainty in this respect has been the great object of the regulations.

I am of opinion that the exhibition of a stern light is not obligatory on the vessel ahead. This opinion must be taken as corrective of any dicta uttered by me in the case of the *Chanonry*.

I pronounce the *Earl Spencer* alone to blame.

Solicitors for plaintiffs: *Ingledew, Ince, & Greening.*
Solicitor for defendants: *Roberts.*

1875
June 1.

Re THE BANDA AND KIRWEE BOOTY. (2271.)

Booty of War—3 & 4 Vict. c. 65, s. 22—Jurisdiction—Secretary of State for India in Council.

ISCLD3.

The Court of Admiralty has no jurisdiction to decide any question concerning booty of war except such as is referred to it by Order in Council. By an Order in Council it was ordered that the claims of all persons to property captured during certain military operations should be referred to the judge of the High Court of Admiralty, who should make such order as to him should seem right both as to the persons who were and the proportions in which such persons were entitled to share therein. The judge, by decree, decided the matters so referred.

Afterwards certain persons entitled by the terms of the said decree to share in the captured property, alleged that certain portions of the captured property had not been distributed amongst the persons entitled, but were improperly withheld by one of Her Majesty's secretaries of state, and applied to the Court for a citation calling upon the secretary of state to enter an appearance and shew cause why a monition should not issue monishing him to bring the property in his hands into Court. The Court refused the application.

On the 6th of May, 1875, a petition was brought in the registry on behalf of Major General John Mackenzie, C.B., and others, claiming to be entitled to participate under the judgment of this Court in the case of *The Banda and Kirwee Booty* (1) in the booty captured "at Banda and Kirwee in 1857, 1858."

The petition, after stating the circumstances which led to the capture of the towns of Banda and Kirwee and the persons of the Mahratta chiefs Narrain Rao and Madho Rao, who were alleged to have acted in all respects as independent sovereigns during the Indian rebellion, and who had afterwards been convicted and sentenced for having waged war against the Queen and the Government of India, proceeded in substance as follows:—

5. At the time of the capture of the said Narrain Rao and Madho Rao and of Kirwee, the said Narrain Rao and Madho Rao were possessed of very considerable moveable property, and the greater portion of the property captured belonged to them and consisted in part of the choses in action which form the principal subject of the present application, namely:—

The petition set out a list of the property in question, comprising specified debts due to the said chiefs from the said East

(1) Law Rep. 1 A. & E. 109. 12 Jur. N.S. 819

India Company and from private individuals, and also of certain jewels belonging to the said chiefs which were sold by the civil officers of the said company.

6. At the time of the capture of Kirwee and of the said chiefs, all prize or booty of war captured in India in operations in which the forces of Her Majesty took part was the property of the Sovereign and not of the East India Company, and the above public debts due to the said chiefs are prize or booty of war, and were, in fact, specifically included in a return of all the Banda and Kirwee captured property transmitted by the secretary to the North-Western Provinces to the secretary of the India Governmant on the 11th day of November, 1859.

7. Previously to the said capture, the Right Honourable Viscount Canning, as Governor-General of India, published in the *Calcutta Gazette* two general orders in relation to booty of war, namely: (1.) a general order, dated November the 27th, 1857, sanctioning the appointment of prize agents, and giving instructions as to the interest of the troops in booty captured, of which said general order the court of directors, in a military despatch dated the 31st of March, 1858, wrote in the following terms, which were approved of by the president of the Board of Control:—"We concur in the views announced in your general order of the 27th of November, 1857, on the question of claim on the part of the troops to have granted them as prize the property belonging to the State and that belonging to private individuals recovered from the mutineers. We also fully approve of your recommendation that property taken by the troops, which is neither claimed on behalf of the State, nor claimed and identified by individuals, who may establish their loyalty, should be considered as prize. We shall accordingly as soon as we are informed by you of the necessary particulars, make application to the Crown, in the usual form, praying a royal grant of the same as prize." (2.) A general order, dated the 29th of January, 1858, declaring "that all moveable property of the description ordinarily distributable belonging, or which might reasonably be presumed to belong, to rebels or mutineers, and which had been or should be captured by the troops engaged in suppressing the rebellion might be fairly treated as prize; and that he had recommended the honourable Court of the East India Company to adopt the necessary measures for obtaining Her Majesty's sanction to the distribution of the said property accordingly."

8. That after the termination of the said military operations Lieutenant-General Sir George Cornish Whitlock and the other officers and troops forming the Saugor and Nerbudda force, and Lord Clyde, as Commander-in-Chief in India, with his personal staff in the field at the time of the said captures, applied to have the proceeds of the said booty distributed amongst them, but the officers and troops belonging to other divisions of the army or armies employed in suppressing the mutiny in that part of India having preferred claims to shares in such prize or booty of war, the Lords Commissioners of Her Majesty's Treasury, after having given several decisions adverse to the original plaintiff and those whom he represented, on the 8th of June, 1864, made a minute, wherein it is stated that they, the said Lords, had "caused a draft of an Order in Council to be prepared, which was read at their board, signifying the pleasure of Her Majesty that the booty of war captured during the operations for the suppression of the rebellion in Central India, and which had devolved to Her Majesty in virtue of her prerogative, should

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RE BANDA AND KIRWEE BOOTY.

be granted to the forces engaged in those operations, and referring the claims of all parties thereto to the judge of the High Court of Admiralty under the authority of 3 & 4 Vict. c. 65, with directions that he should make such order as to him should seem right."

9. That by an Order in Council, dated the 10th day of June, 1864, which is the order referred to in the said minute, Her Majesty was pleased by the advice of her Privy Council to refer to the judge of the High Court of Admiralty all claims to the property captured during the aforesaid operations in the terms following (1):—

"Now, therefore, Her Majesty is pleased to order, and it is hereby ordered by and with the advice of her Privy Council, that the claims of all parties whomsoever to the property captured during the aforesaid operations and the proceeds thereof be referred to the judge of the High Court of Admiralty of England, who shall take into consideration, if it shall appear to him necessary for the purposes of justice, any capture that may have been made of any property during the said operations by any of the claimants, and shall make such order as to him shall seem right both in regard to the persons who are and the proportions in which such persons are entitled to share therein, and to the costs and expenses incurred in relation thereto by the respective claimants, whether before or subsequently to this order, reserving, however, to Her Majesty the right to direct the rates or scale of distribution according to which the said property, or the proceeds thereof, shall be paid to the several ranks of the force or forces to which such property shall be adjudged."

10. In obedience to and for carrying out the purposes of the reference made by the said Order in Council this suit was instituted, and after a lengthened hearing of the claims therein preferred to share in the said booty, judgment was, on the 30th day of June, 1866, delivered by the then judge of this Court, whereby he pronounced the personal representatives of the late General Lord Clyde and the officers of his staff, personal as well as general, who were in the field at the time, entitled to share in the booty captured at Banda and Kirwee in April and June, 1858, and subject to this right he awarded the whole of the said booty to Lieutenant-General Sir George Cornish Whitlock and the force under his command called the Saugor and Nerbudda field force, including among the latter the officers and troops under Lieutenant-Colonel Keating and any other troops left by General Whitlock on his march who, at the time of the capture, formed a portion of his division, and were still under his command, and he disallowed all other claims to the said booty.

11. In conformity with orders issued by the East India Company all the said prize or booty of war, including the sums payable or received on the said public and private debts due to the said chiefs was handed over to, or taken possession of, or retained by the said East India Company, until such time as the same should become distributable as prize amongst the captors, and remainded under the custody of, or were retained by, the said East India Company until the transfer, under 21 & 22 Vict. c. 106, of the Government of India from the East India Company to Her Majesty the Queen.

12. Upon the said transfer of the Government of India to Her Majesty the

(1) The recitals contained in the Order in Council are omitted.

Queen, the said prize or booty of war, and all the liabilities in respect of the same, including the obligation to pay the said public debts, came under the custody and control of or were transferred to Her Majesty's Secretary of State for India in Council, who is liable to account for the same to your petitioners, and those whom they represent, as the sole grantees of Her Majesty the Queen, of the same.

13. Since the said order of this Court, of the 30th day of June, 1866, part only of the proceeds of the said prize or booty of war has been paid to the parties entitled thereto, or reserved on account of unclaimed shares, according to the said judgment of this Court.

14. In addition, further sums for or in respect of prize or booty of war, so granted to the captors as aforesaid by her most gracious Majesty the Queen, are still due to your petitioners and those whose interests they represent.

15. Since the payments of the said portions of the said booty, mentioned in the 12th paragraph of this petition, claims have been preferred on behalf of your petitioners and those whose interest they represent, to Her Majesty's late and present Secretary of State for India in Council, for payment of the said remaining sums due in respect of the said booty, and that the justness of such claims has been by the Secretary of State for India in Council at one time admitted in respect of portions of the said claim; but your petitioners and those whose interests they represent have been unable to obtain payment of either of the said sums from the late or from the present Secretary of State for India, although repeated applications have been made to them for the same.

Notwithstanding the said Order in Council of the 10th of June, 1864, and the said judgment of this Court, Her Majesty's late and present Secretary of State for India in Council, have without title or lawful authority, refused to pay the said sums to the parties entitled thereto, and still retain the same.

The petition concluded with the following prayer:—

Wherefore the solicitor for the petitioners humbly prays that the right honourable the judge will be pleased to order that your petitioners be at liberty to enter an appearance in this cause as plaintiffs or interveners, or in either character, and further, to order a citation to issue against the Most Honourable Robert Arthur Talbot the Marquis of Salisbury, Her Majesty's Secretary of State for India in Council, requiring him to enter an appearance in this cause and to shew cause why a monition shall not issue from this Court at the instance of your petitioners, monishing him, as such Secretary of State for India in Council, to bring into the registry of this Court all the said principal sums mentioned in the 5th (1) and 13th paragraphs of this petition and to account to and to bring into the registry of this Court the interest due on the several sums in the said paragraphs mentioned, or to make such other order in the premises, as to the said right honourable the judge shall seem just.

The allegations in the petition were supported by an affidavit.

May 11th. *Dr. Tristram, Haughton,* and *Willis Bund,* on behalf of the petitioners, moved the judge in Court in the terms

(1) The paragraphs of the petition setting out the property claimed.

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of the prayer of the petition. This is a case entirely primæ impressionis. The jurisdiction of the Court of Admiralty over booty of war only came into being on the passing of 3 & 4 Vict. c. 65, and whenever previous to that time questions concerning booty have found their way into the books, they have either been in cases before the Court of Admiralty sitting as a prize court, or before trustees or commissioners whose decisions were not, and were never meant to be, given on definite legal principles. The *Deccan Case* (1) must be comprised among this last class of cases. The legislature, however, have now rendered this Court competent to decide judicially on all matters and questions concerning booty, and has enacted that the jurisdiction so bestowed shall be exercised in accordance with the principles of the law of prize. The 22nd section of 3 & 4 Vict. c. 65, in fact, confers on this Court complete jurisdiction over all matters and questions concerning booty of war which have been referred to it under an Order in Council, and further provides that in all matters so referred to it the Court must proceed as in prize of war. In the Order of Council in the present case, the sole reservation is a reservation to Her Majesty of the right to direct the rates of distribution according to which the proceeds of the booty shall be paid to the rightful claimants thereto. The Court must, therefore, in this instance, possess all other jurisdictions and powers which it would possess of sitting to adjudicate on a question of maritime prize. The Court there—just as in cases of prize it has always been held to be the proper tribunal for determining the question of prize or no prize: *Le Caux* v. *Eden* (2)—has, in the first place, in cases of booty where the subject-matter of the booty is not defined by the Order in Council under which proceedings are taken, power to decide what is or is not booty. Secondly, it has the power, already exercised in this case by Dr. Lushington, of pronouncing who the rightful claimants to the booty are. Thirdly, it must have the power to ensure that the proceeds of the booty should be delivered to the rightful claimants. The petitioners do not ask the Court to go beyond its award, and what they seek is only that the judgment should be carried out. The present application surely would be granted if no booty at all had been distributed; and what

(1) 2 Knapp, 105, 114, 127.

(2) 2 Dougl. 594.

difference can it make that only a portion of the booty has been wrongfully kept back? The principle laid down in the case of *Lord Camden* v. *Home* (1) that a prize court has power to enforce its decrees, applies with equal force to the jurisdiction over booty this Court now possesses. In the opinion of Dr. Lushington, this Court, sitting as a court of booty, was bound to follow the practice and doctrines of the prize court with respect to questions of joint capture: *The Banda and Kirwee Booty.* (2) Ought it not also to follow the well-known practice of the prize court with respect to monitions to parties to bring into Court the proceeds of prize remaining in their hands. [He referred to *The Elsebe.* (3)]

[SIR ROBERT PHILLIMORE. Has any portion of the proceeds of the booty captured at Banda and Kirwee ever been paid into the registry of this Court?]

No; but it is submitted that from and after the issue of the Order in Council referred to in the petition, this Court became possessed of authority to order in its discretion that the proceeds should be brought in. In fact the result of the provisions of 3 & 4 Viet. c. 65, s. 22, is that, except in so far as is expressly stated to the contrary in the Order in Council under which each particular case is referred, the procedure in cases of military booty and of maritime prize is advisedly made the same in all possible respects. Expressio unius est exclusio alterius. Moreover, it was clearly the intention of the legislature that this Court should not only make its award as to the booty before it, but also be able to do complete justice to those to whom such booty should have been awarded.

It is expressly enacted by the section of 3 & 4 Vict. c. 65, already referred to, that the judgment of the Court upon any matter concerning booty referred to it should be binding upon all parties concerned; and this being so, it must follow that the Court has the power in a case where, as here, its judgment has only been partially performed, to enforce that the part thereof which remains unperformed should be carried out. Since the passing of the statute 2 Wm. 4, c. 53, the property in all booty or prize granted out by

(1) 4 T. R. 382.
(2) Law Rep. 1 A. & E. 109.
(3) 5 C. Rob. 174; see the *Pomona*, 1 Dodson, 25.

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the Crown vests irrevocably in the grantees. It must, therefore, be conceded that the petitioners who, under the judgment of the Court, are entitled to share as grantees from the Crown in the booty captured at Banda and Kirwee, have a legal right to the possession of the booty to which they are so entitled; and, moreover, that in case they are deprived of such possession, some legal remedy must be open to them to actually gain possession of that which the Crown clearly intended they should receive. If, then, there is such a legal remedy, surely there exists some tribunal before which it may be enforced. The contention of the petitioners is that this Court—the Court which has seisin of the cause of *The Banda and Kirwee Booty;* the particular Court to which the legislature has given jurisdiction over booty—is obviously that tribunal; and that, except with respect to the question in what proportionate shares the booty in question here should be distributed, the Act of Parliament, combined with the Order in Council of the 10th of June, 1864, has given this Court all the powers and authorities which could by any means be necessary for enabling the rightful claimants to participate in the booty awarded to them. A power to compel third parties, who may have in their possession portions of booty, to bring such portions into Court, seems certainly to be a power which a Court having jurisdiction over the subject-matter of booty would impliedly possess. The view taken by the petitioners on this point is supported by the decision of the Lords Commissioners of Appeal in Prize Cases in the case of the capture of Chinsurah. (1)

Cur. adv. vult.

June 1. SIR ROBERT PHILLIMORE. This is an application to the Court on behalf of Major-General Mackenzie, and others, persons interested in the distribution of the Banda and Kirwee booty, to be at liberty to enter an appearance as plaintiffs or interveners in this matter in this Court; and further, to order a citation to issue to the Marquis of Salisbury, Her Majesty's Secretary of State for India, requiring him to enter an appearance, and to shew cause why a monition should not issue against him to bring into Court certain sums of money, and also the interest due upon these sums.

This application is founded upon a petition, supported by an

(1) 1 Acton, 179.

affidavit of the Rev. Alfred Kinloch, late chaplain in the Madras army,—the army which captured the booty, who appears to have taken an active part in the assertion and maintenance of the claims of the captors, of whom he has been the agent.

Various documents are appended to this affidavit. The petition sets forth the breaking out of the rebellion in India in 1857, the capture of the Mahratta chiefs and of the town of Kirwee in 1858, and that at the time these chiefs were possessed of—I cite the words of the petition—"very considerable moveable property, and that the greater portion of the property captured as hereinbefore mentioned belonged to them, and consisted in part of the following choses in action which form the principal subject of the present application, namely: [His Lordship here read the description of the property in question as set out in the petition.]

The petition further sets forth the following Order in Council: [His Lordship here read the Order in Council as set out in the petition.]

The petition then states the institution of the suit and the judgment of the Court on the 30th of June, 1866, whereby "the judge pronounced the personal representatives of the late General Lord Clyde and the officers of his staff, personal as well as general, who were in the field at the time, entitled to share in the booty captured at Banda and Kirwee in April and June, 1858, and subject to this right he awarded the whole of the said booty to Lieutenant-General Sir George Cornish Whitlock, and the force under his command, called the Saugor and Nerbudda field force, including among the latter the officers and troops under Lieutenant-Colonel Keating, and any other troops left by General Whitlock on his march, who at the time of the capture formed a portion of his division, and were still under his command; and he disallowed all other claims to the said booty."

The petition then proceeded to complain that, since the order of the Court a part only of the proceeds of the booty has been paid, and sets forth what that part is.

The part alleged to be unpaid consists of the property of the Mahratta chiefs already referred to, and, in addition, the following sums of rupees:

(1.) Rs.110,000 in respect of interest on a principal sum of Rs.532,198 part of certain moneys by the Indian authorities

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erroneously severed from and afterwards restored to the prize fund from the 19th of July, 1850, to the 28th of September, 1862, which said sum was erroneously severed from the prize fund and appropriated to the purposes of the Indian Government.

(2.) A sum estimated at Rs.600,000 in respect of interest on Sowat Rs.1,465,335, and other prize or booty of war, the conversion of which was delayed by the Government of India.

(3.) Rs.65,000 erroneously deducted by the Government of India from the proceeds of the said prize or booty of war on account of auction commission, together with interest for the same from the date of such deduction.

The petition further states that applications have been made to Her Majesty's late and present Secretary of State for India in Council, in whom, since 21 & 22 Vict. c. 106, transferring the Government of India from the East India Company to Her Majesty, the property has become vested, and that such applications have been refused.

I have thought it necessary to state the petition at some length, as the question of law which it raises is important, and I believe quite novel.

The petitioners contend that, inasmuch as the Crown referred the question of booty under 3 & 4 Vict. c. 65, to the High Court of Admiralty by the Order in Council which I have stated, the Court has therefore jurisdiction to enforce its decree of the 30th of June, 1866, and for this object to order the portion of the booty which it is alleged has not been paid in conformity with the decree, to be brought into Court, and to direct its proper distribution according to that decree. It has been argued that this is the course which the Court would pursue in a case of maritime prize, and that the Court has the same jurisdiction by the statute in questions of military booty.

It has been further argued that the refusal of the secretary of state to pay these sums of money to the claimants amounts to an annulment pro tanto of the decree of the Court, and that the Court once legally seised of the case must have full power to enforce its decree.

There is much that is plausible in this argument, and I have taken some time to consider it. The first thing to bear in mind is that this Court has no original jurisdiction in matters of booty

of war, and that its jurisdiction is derived exclusively from the joint operation of the statute and the Order in Council.

The words of the statute (3 & 4 Vict. c. 65, s. 22) are:—"And be it enacted that the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please Her Majesty, her heirs and successors, by the advice of her and their Privy Council, to refer to the judgment of the said Court. And in all matters so referred the Court shall proceed as in cases of prize of war, and the judgment of the Court therein shall be binding upon all parties concerned."

I must therefore consider what is the matter and question which it pleased Her Majesty to refer to the Court. The Order in Council, already stated at length, empowers the judge to determine, first, who the persons are entitled to share in the booty; secondly, the proportions in which they are to share; and thirdly, the question of costs and expenses.

These, then, are the only subjects over which the Court had jurisdiction. And it is not complained that the decision of the Court upon any of these points has been disregarded by those in whom the custody of the booty is vested.

It might have pleased Her Majesty, or it may please Her Majesty, to refer to the Court the further questions as to the amount of the booty and what are the constituent parts of it. But until the Court has this jurisdiction given it it cannot, I think, by any legitimate construction of the existing Order in Council, exercise such jurisdiction.

I have not failed to notice the argument, arising from the reservation to Her Majesty in the Order to direct the rates or scales of distribution. But I think it would be stretching the doctrine of inferring admission of one thing from exclusion of another far beyond its proper limits if I were to construe the order as having given the jurisdiction which is contended for. Being, therefore, not satisfied by the argument on this ex parte application that I have jurisdiction, I think it would be wrong to call upon the secretary of state to enter an appearance and shew cause against this monition, and I decline to do so.

Solicitor for the petitioners: *Woodforde.*

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April 17.

THE CHASCA. (7063.)

Damage to Cargo—Dangers of the Seas—Bill of Lading.

4 C P D. 317

A shipowner signed bills of lading for the due delivery of cargo at the port of discharge, the dangers of the seas and fire only excepted:—

Held, that the exceptions in the bills of lading did not operate to protect him from liability for damage done to the cargo by sea water, let into the hold in consequence of the barratrous act of the crew in boring holes in the ship during her voyage, for the purpose of scuttling her.

Difference between "dangers of the seas" in a bill of lading and in a policy of marine insurance.

The Freedom (Law Rep. 3 P. C. 594) commented on.

THIS was an appeal from a decree of the County Court of Durham, in a suit instituted under the 2nd section of the County Courts Admiralty Jurisdiction Act Amendment Act, 1869 (32 & 33 Vict. c. 51).

The *Chasca*, the vessel proceeded against, an American ship, was chartered by her master at San Francisco, to proceed to Portland, Oregon, and there load a cargo of wheat; and therewith proceed to Liverpool or Cork for orders, and thence to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg. The master to sign bills of lading at not less than chartered freight, without prejudice to the charterparty. The wheat was loaded at Portland, and bills of lading were given for the due delivery of the cargo at the port of discharge, the dangers of the seas and fire only excepted.

During the voyage, holes were found to have been bored with augers in the sides of the *Chasca*, below the waterline. The holes were successfully plugged after several hours, during which the ship continuously leaked. Afterwards, some of the crew, who had been put in irons for mutiny, confessed that they had bored the holes. On the arrival of the ship at West Hartlepool, her cargo was found to be damaged by salt water. It was disputed in the county court whether the salt water which reached the wheat got into the ship through the holes or owing to her straining in heavy weather. The learned judge professed himself satisfied upon the evidence that the cargo had been damaged by water which got into the ship through the holes made by the crew, but held that

the shipowner was not liable for such damage under the bill of lading. From this decree the appeal was brought.

It was not disputed on the appeal, that the cause of the damage was sea water which entered the ship through the holes barratrously made by the crew.

Cohen, Q.C., and *Warr*, for the appellant. The judgment appealed from proceeds upon the erroneous supposition that there is an analogy between the perils insured against in a policy of insurance and the excepted perils in a charterparty or bill of lading. The words "dangers of the seas," in a contract of indemnity against their consequences, have a different meaning from the words "dangers of the seas" when used by a shipowner in limitation of his express contract to carry in safety. Apart from an express contract by charterparty or bill of lading, a shipowner's liability is co-extensive with that of a common carrier. *Liver Alkali Co.* v. *Johnson.* (1) Under an express contract by charterparty or bill of lading, the shipowner's liability is absolute, unless the exceptions which he has introduced in his own favour protect him: *Lloyd* v. *General Iron Screw Colliery Company* (2); *Kay* v. *Wheeler.* (3) The loss is here admittedly due to barratry: *Ionides* v. *Universal Marine Insurance Company.* (4) Barratry is itself a common exception in bills of lading. The bill of lading in this case excepts nothing but "dangers of the seas and fire." Clearly therefore, the shipowner is liable.

Milward, Q.C., and *E. C. Clarkson*, for the respondents. The *Chasca* is an American ship and the charter was signed in America, consequently the custom of England does not apply to her. The question is solely on the construction of the bill of lading, whether damage by barratry falls under "dangers of the seas." In *The Freedom* (5) it is said, "The words in the bills of lading 'perils of the seas,' must of course be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance not to go into distant causes, but to look exclusively to the immediate and proximate cause of the

(1) Law Rep. 7 Ex. 267; Law Rep. 9 Ex. 338.

(2) 3 H. & C. 284; 33 L. J. (Ex.) 269.

(3) Law Rep. 2 C. P. 302.

(4) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.

(5) Law Rep. 3 P. C. 594.

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loss." The decision in *Dudgeon* v. *Pembroke* (1) is to the same effect. Here the proximate cause was damage by sea water, which is a peril of the seas, and not barratry. Besides, the owner is not answerable for acts of barratry, because such acts are not within the scope of the employment of the crew as agents for the shipowner: Story on Agency, p. 295. [They also referred to *The Duero.* (2)]

Cohen, Q.C., in reply. Insurance is not affreightment. The doctrine of the proximate cause has no application. Here the shipowner has contracted to take certain risks upon him and such risks include barratry. [He referred to *Grill* v. *Iron Screw Colliery Company.* (3)]

SIR ROBERT PHILLIMORE. The only question in this case is whether damage resulting from the barratrous act of the crew, in boring holes in a ship's sides, falls under the exception of dangers of the seas in the bill of lading. The learned judge of the county court has come to the conclusion that it does, founding his opinion upon a presumed analogy between cases of policies of insurance and cases depending upon contracts contained in bills of lading. This analogy is in my judgment fallacious. In questions arising on exceptions introduced into contracts of affreightment, the Court is bound to look to the real, and not merely, as in cases of marine insurance, to the proximate, cause of the loss. The only authority cited to the contrary has been a dictum in *The Freedom* (4), where the learned judge who delivered the judgment of the Privy Council says: "The words 'perils of the seas' in the bill of lading must of course be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance not to go into distinct causes, but to look exclusively to the immediate or proximate cause of the loss." This dictum was in no way necessary to the decision of the case before their lordships, and it appears to me that it was an erroneous dictum that must have found its way through inadvertence into their Lordships' judgment. The cases in the Privy Council and those in the Courts of

(1) Law Rep. 9 Q. B. 581.
(2) Law Rep. 2 A. & E. 393.
(3) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.
(4) Law Rep. 3 P. C. 594.

Common Law, particularly *Lloyd* v. *General Iron Screw Collier Company* (1) and *Grill* v. *General Iron Screw Colliery Company* (2) shew that losses occasioned by negligence are not within the exception of "perils of the seas" in a bill of lading. À fortiori, therefore, losses by barratry are not within the exception, and the boring of the holes was admittedly the barratrous act of the crew. Common sense and the interests of navigation seem to render it desirable that Courts of law should not include barratry within the exception of dangers or perils of the seas, and the entire tenor of the decisions justifies me in refusing so to include it. The decree of the Court below is therefore reversed with costs.

Solicitors for appellants: *Pritchard & Sons.*
Solicitor for respondents: *Cooper.*

THE NILE. (6829 & 6884.)

May 11.

Apportionment of Salvage—Services rendered by Transport—Award to Senior Naval Officer in Command in the Locality.

The captain of a Queen's ship lying at anchor in a foreign port received intelligence that an English steamer was outside the port disabled, and in a position of great danger, and communicated with the master of a screw steamer which was under charter to the Lords of the Admiralty as a transport, and was then coaling in the port. In consequence of this communication the transport, after taking on board one officer and a party of petty officers and seamen from the Queen's ship, proceeded to the disabled vessel and succeeded in placing her in safety. As salvage remuneration for the services so rendered a sum of 1000*l.* was tendered and accepted in a cause of salvage instituted on behalf of the owners, master, and crew of the transport, and the captain, officers, and crew of the Queen's ship. On an application to apportion this sum:—

The Court awarded 400*l.* to the owners, master, and crew of the transport, 400*l.* to the captain of the Queen's ship and the party of petty officers and seamen who went on board the transport, and 200*l.* to the officer who accompanied them.

THERE were originally two separate causes of salvage instituted; one, No. 6829, on behalf of the owners, master, and crew of the steam vessel *Finisterre;* the other, No. 6884, on behalf of Mounford

(1) 3 H. & C. 284; 33 L. J. (Ex.) 269.

(2) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.

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Stephen Lovick Peile, Esq., the commander, and the rest of the officers and crew of H.M.S. *Simoom*, against the steam vessel *Nile*, her cargo, and freight. At the time of the institution of suit No. 6884 the proctor for the plaintiffs therein duly filed in the registry the consent of the Lords of the Admiralty to the prosecution of the claim in such suit. An appearance in both suits was entered on behalf of the owners of the *Nile*, and of the owners of her cargo, and the two causes having, on the 9th of June last, been consolidated by order of the Court, a petition in the consolidated cause was filed, which, so far as material, was in terms substantially as follows:—

1. The *Finisterre* is a screw steamer of 551 tons register, with engines of 90-horse power nominal, and is of the value of about 18,000*l*.

H.M.S. *Simoom* is an iron steamship of 1980 tons register, and carries a complement of 172 officers and men.

The *Nile* is a screw steamer of about 725 tons register, and was, at the time of the occurrences hereinafter mentioned, bound for Demerara with a general cargo.

2. On the 27th of February, 1874, the *Finisterre* (which was then engaged under charter in Her Majesty's transport service) was lying at anchor at Porto Grande, in the island of St. Vincent (copies of the charterparty and sailing instructions from the Admiralty to the master of the *Finisterre* are hereto annexed, and may be referred to as part of the petition). The *Simoom* also lay at anchor at Porto Grande, under the command of Captain Peile, R.N., the senior officer of Her Majesty's navy in that locality.

3. In the forenoon of that day, whilst the *Finisterre* was coaling for her return voyage to the Gold Coast, a boat's crew from the *Nile* landed at St. Vincent with the intelligence that the *Nile* was then lying outside in a helpless state, fast drifting on to the rocks on the north-east side of the island.

4. The boat's crew applied for immediate assistance to the vice-consul, who acquainted Captain Peile with their request.

The master of the *Finisterre*, on receipt of a communication from Captain Peile, at once got up steam and made preparations for towing; and by about 1 p.m. the *Finisterre* was able to weigh anchor and put out to sea under steam, having previously taken on board from the *Simoom* Navigating Lieutenant Adlam, transport agent at St. Vincent, two petty officers, four seamen, and twenty-one Kroomen, together with a 9-inch hawser and other gear, sent by the order of Captain Peile. The wind at this time was blowing a fresh gale from the north and the east, with a heavy sea running, with a current setting in the same direction as the wind.

5. At about 2 p.m. Point Columna was rounded, and the *Nile* was sighted to the northward, and about five miles distant. She had all possible sail set, but she lay helpless and unmanageable in the trough of the sea, with the sails all aback, and was drifting directly on to a rocky lee shore, with no anchorage-ground

near. She had no steam, the mainshaft of her screw having broken many days previously, since which time she had drifted helplessly.

5. The *Finisterre*, proceeding at full speed, came up with the *Nile* at about 3.30 p.m., and, heaving to, inquired by signal if the *Nile* wanted assistance, and received the answer "Yes." The master of the *Nile* then asked what the *Finisterre* wanted for towing the *Nile* in. Those on board the *Finisterre* then answered that they could make no agreement. The master of the *Nile* then told the *Finisterre* to take him in tow.

The petition then stated that the *Finisterre* took the *Nile* in tow and brought her into the port in safety. Several articles in the petition were occupied by the statement of the difficulties encountered in rendering the service. The petition then proceeded in substance as follows:—

11. At the time the *Finisterre* made fast to the *Nile* the latter vessel was quite helpless, and in such a position that nothing but steam power could have prevented her from drifting on to the rocks in the course of a very short time, and there becoming a total wreck. No steamer besides the *Finisterre* was at hand or could have been procured.

13. The men from the *Simoom* took an active part in all the measures adopted for the preservation of the *Nile*, and materially contributed to her safety.

Subsequently to the filing of the petition the defendants tendered, by act in Court, the sum of 1000*l.*, with costs up to the time of tender, and the tender was accepted.

May 4. The consolidated cause came before the Court on an application that the principal amount so tendered and accepted might be apportioned, in accordance with s. 466 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

It appeared, by affidavits which had been filed on behalf of the defendants, that the value of the *Nile* was 12,000*l.*, the value of her cargo about 21,000*l.*, and of her freight about 1300*l.*

The substance of the material portions of the charterparty referred to in the petition are stated in the judgment.

W. C. Gully, for the owners, master, and crew of the *Finisterre*. The *Finisterre* was the principal salvor, and it was mainly owing to her steam power that the *Nile* was brought into a place of safety. In these circumstances she is entitled to a large share of the salvage award, for, although chartered to the Lords of the Admiralty for purposes connected with her employment as a trans-

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port, she was not demised, and the salvage services rendered by her were rendered entirely on the responsibility of her master, and at the risk of her owners, the charterparty expressly stipulating that repairs should be done at the expense of her owners, and that in all cases of sea damage the loss should be borne by them, and not by the Lords of the Admiralty. It is admitted that Lieutenant Adlam and those of the crew of the *Simoom* who went on board the *Nile* are entitled to be rewarded for their services, but it is submitted that the rest of the officers and crew of that vessel, as they remained in harbour and underwent no extra labour of any kind, cannot rightly claim as salvors: see *The Thetis*. (1) With regard to the claim set up by Captain Peile, in his capacity of senior naval officer on the station, it must be remembered that the *Finisterre* was not in the position of a tender to the *Simoom*, and that the practice prevailing in cases of prize can have no application to a case like the present. It is true that in the case of *The Thetis* (1), salvage remuneration was awarded to the admiral commanding on the station, but the circumstances of that case were peculiar, and the success of the service there was in a great degree due to his superintendence. In this case, Captain Peile could not have compelled the master of the *Finisterre* to render services which were clearly without the scope of the vessel's employment as a transport, and consequently in requesting that the *Finisterre* might proceed to the assistance of the *Nile*, Captain Peile rendered no salvage service. He underwent no labour, and placed no property of his own in danger. [He referred to *The Purissima Concepcion* (2), *The Aquila* (3), the Admiralty Regulations for the Transport Service, and the Instructions for Masters of Transports.]

W. G. F. Phillimore, for Captain Peile and the officers, other than Lieutenant Adlam, and the crew of the *Simoom*. The Lords of the Admiralty were entitled under the charterparty to the entire services of the *Finisterre* during the term of her employment as a transport, and she must be considered as being in the service of the *Simoom* pro hâc vice. By sending the *Finisterre* to assist the *Nile*, Captain Peile incurred grave responsibility, and the public service would have sustained great incon-

(1) 3 Hagg. Adm. 14; 2 Knapp, 390. (2) 3 Wm. Rob. 181.
(3) 1 C. Rob. 37.

venience if the *Finisterre* had been damaged in rendering the service. The case of *The Thetis* (1) is a distinct authority that an officer of the navy in the position of Captain Peile, whose orders the *Finisterre* was bound to obey, is entitled to be rewarded as a salvor. So also in *The Purissima Concepcion* (2), remuneration was awarded to a plaintiff who had not been immediately engaged in rendering salvage service. [Reference was also made to *The Collier* (3) and *The Maria Jane.* (4)]

E. C. Clarkson, for Lieutenant Adlam. Lieutenant Adlam was not only "transport agent" at St. Vincent, under whose immediate authority the master of the *Finisterre* was placed by the transport regulations, but he also must be considered to have had the actual direction of the salvage service. He had power under the regulations to supersede the master of the *Nile,* and it is contrary to experience to suppose that the chief responsibility in performing the salvage service did not rest upon him alone. On these grounds he has a special claim to be liberally remunerated. The case of *The Scout* (5) is an authority on the question whether the claims of the owners of the *Finisterre* to share in the salvage reward are not affected by the charterparty, for in that case the salving vessel was at the risk of the owners, yet the Court awarded to the charterers salvage reward, considering them in the position of pro hâc vice owners. Moreover, the coals used by the *Finisterre* were supplied by Government, and as she was chartered by the month, she would receive payment from the Lords of the Admiralty for the time during which she was engaged in rendering the salvage service.

Gully, in reply.

Cur. adv. vult.

May 11. SIR ROBERT PHILLIMORE. In this case a salvage service of considerable merit was rendered on the 27th of February, 1874, to a large screw steamer, called the *Nile,* lying on the N.E. side of the island of St. Vincent, in a state of the greatest danger.

At the time when the service was rendered the *Finisterre,* a

(1) 3 Hagg. 14, 60; 2 Knapp, 390, 410.

(2) 3 Wm. Rob. 181.

(3) Law Rep. 1 A. & E. 83.

(4) 14 Jur. 857.

(5) Law Rep. 3 A. & E. 512.

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screw steamer of 551 tons, with a crew of a master and twenty-one hands, was lying at anchor at Porto Grande, in the island of St. Vincent, and in the same port there was also lying at anchor H.M.S. *Simoom*, under the command of Captain Peile, the senior officer of Her Majesty's navy in that place. A boat's crew from the *Nile* went to the vice-consul asking for assistance; he referred them to Captain Peile, who communicated with the *Finisterre*. The result was that a lieutenant, two petty officers, four sailors, and twenty-one Kroomen went on board the *Finisterre*, and this vessel, with these additions to her own crew, proceeded to the *Nile*, and brought her in safety into port. For this service 1000*l*. has been tendered and accepted. The Court is now asked to apportion this sum among the salvors.

There is no doubt that the principal salvor was the *Finisterre*. Steam power, which she applied, was the great agent in delivering the *Nile* from her perilous situation. But a question has arisen as to who are entitled to receive her share of remuneration, and as to whether, in consequence of certain circumstances, that share is, notwithstanding her steam power, to be of a more limited character than on general principles it would otherwise be.

The peculiar circumstances are these:—The *Finisterre*, at the time of the Ashantee war, had been chartered by the Government as a transport; by the terms of the charter she supplied her own master and crew, and if she was burnt, sunk, or taken by the enemy, her value was to be replaced by Her Majesty to her owners; if she was lost by the dangers of the sea or tempest, or from being driven on shore by accident, such loss was to be considered as a sea risk, and not to be indemnified by Her Majesty. The charter incorporated also certain "Regulations for Her Majesty's Transport Service," and "Instructions for Masters of Transports;" and, according to the latter, "the vessel will be employed in the conveyance of troops, horses, or other animals, stores, or as a hospital ship, or in any other way that may be ordered," &c. I must here observe that I am of opinion the words "in any other way" must be construed as applying to things ejusdem generis, things connected with transport service. So in the instructions the language is "or for any other purpose connected with the vessel's employ-

ment as a transport." It is also provided in the instructions that the master may receive orders from the senior naval officer. Having reference to these documents, I am of opinion that the *Finisterre* was never demised—indeed, it was not so contended—to Her Majesty; that there was no temporary transfer of her ownership to Her Majesty; and that her owners are entitled (a point faintly, if at all, contested) to her share of salvage remuneration. I think, however, that she was so far under the control of the senior naval officer, Captain Peile, that on the one hand she could not have acted as salvor without his permission, though, on the other hand, she could not have been ordered by him to perform this service,—which was not, in my judgment, within the terms of the charter, and I think that, in awarding her remuneration, I ought to bear in mind that she was set in motion, so to speak, by Captain Peile. The same observations lead me to the conclusion that this officer is undoubtedly to be considered, having regard to principle, and the decided cases on the subject, as a meritorious salvor. I am also of opinion that Lieutenant Adlam, who must be considered as having had, in great measure at least, charge of the expedition, has a distinct persona standi as a salvor.

I award 400*l.* to the owners, master, and crew of the *Finisterre;* 200*l.* to Lieutenant Adlam; 400*l.* to Captain Peile and those of the crew of the *Simoom* and the Kroomen who were on board the *Finisterre.*

Solicitors for owners, master, and crew of the *Finisterre: Pritchard & Sons.*

Proctor for Captain Peile and officers and crew of H.M.S. *Simoom: Burchett.*

Solicitor for owners of the *Nile: Cooper.*

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July 14.

THE JENNIE S. BARKER. (L. 198.)
THE SPINDRIFT. (L. 199.)

Damage—Collision between Sailing Vessel and Steam Tug hove to with her Engines stopped—Regulations for preventing Collisions at Sea, Art. 15.

In a case where a collision occurred between a sailing vessel and a steam tug hove to with her engines stopped:—

Held, that it was the duty of the steam tug to have kept out of the way of the sailing vessel.

THESE were cross-causes of damage; the principal cause instituted on behalf of the owners of the steam tug *Spindrift* against the *Jennie S. Barker*, the cross-cause on behalf of the owners of the *Jennie S. Barker* against the *Spindrift*.

The petition in the principal cause was in terms as follows:—

Between noon and 0.30 p.m., on the fourteenth day of June, one thousand eight hundred and seventy-five, the steam tug *Spindrift*, of one hundred and seventy-five tons gross register, manned by a crew of nine hands, all told, was about one mile from the land, between Point Lynas and Middle Mouse.

The wind at such time was about south-west, blowing a moderate gale, with squalls, and the tide was about half ebb, and of the force of about one and a half knots per hour. The *Spendrift* was lying to, with her engines stopped and her helm lashed to port, and was heading about south-east.

At such time a barque, which proved to be the above-named barque *Jennie S. Barker*, was seen at the distance of about one mile and a half from the *Spindrift*, coming up astern of her, a little on her port quarter.

The *Jennie S. Barker* approached and caused danger of collision with the *Spindrift*. The engines of the *Spindrift* were ordered ahead, but before she could go ahead, the *Jennie S. Barker* ran against and, with her stem and port bow, struck the *Spindrift* on her starboard paddle-box, and did her a great deal of damage, in consequence of which she took the assistance of a steam tug, by which she was towed to Liverpool.

Those on board the *Jennie S. Barker* improperly neglected to keep a good look-out.

The *Jennie S. Barker* improperly neglected to keep out of the way of the *Spindrift*.

The helm of the *Jennie S. Barker* was improperly starboarded before the said collision.

The said collision was occasioned by all, or some, or one of the matters stated in the three last preceding articles of this petition, or otherwise, by the negligent and improper navigation of the *Jennie S. Barker*.

The said collision was not in any way occasioned by any negligence on the part of those on board the *Spindrift*.

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The following petition, which, it was agreed, should serve as the answer in the principal cause, was filed in the cross-cause on behalf of the owners of the *Jennie S. Barker* :—

The *Jennie S. Barker* is a barque of 1059 tons register, and at the time of the occurrences hereinafter mentioned was on a voyage from St. John, New Brunswick, to Liverpool, with a cargo of deals. The *Spindrift* is a steam tug of the port of Liverpool.

Shortly before noon on the 14th of June, 1875, the *Jennie S. Barker* was off the coast of Anglesea, near to Point Lynas, heading about S.E. by E. to E.S.E., and intending to pick up a pilot at the Point Lynas Station to take her into Liverpool. The wind was unsteady, blowing hard from S.S.W. to S.W., with occasional heavy squalls which were accompanied by thick, heavy rain. The *Jennie S. Barker* was under lower fore and main topsails, foresail, fore and main topmast-staysails, and mizen-staysail, and was going about five knots an hour.

At this time and under these circumstances the look out of the *Jennie S. Barker* saw and reported a pilot boat and a steam tug, which latter vessel afterwards proved to be the *Spindrift*. She was right a-head, heading somewhat in the same direction as the barque, but more to the south. She appeared to be about a mile distant. At this time the weather became thick with rain and the pilot boat was lost to view.

The *Jennie S. Barker* kept her course until she was about three ship's lengths from the *Spindrift*, when it was found that, although steam and smoke were coming from the steam pipe and funnel of the latter, she had apparently stopped, and was not moving a-head. The helm of the *Jennie S. Barker* was thereupon, in order to avoid a collision, at once put hard up, but she did not answer her helm.

Immediately before the collision the helm of the *Jennie S. Barker* was put hard down with the view of easing the blow, but before the port helm had taken effect the martingale of the barque and the starboard paddle-box of the *Spindrift* came into contact, the jib-boom of the barque at the same time catching the mast of the tug and bringing it down, and considerable other damage was done.

At the time when the helm of the *Jennie S. Barker* was put up, no one was visible on the deck of the *Spindrift*. Her crew were seen running up from below just at the time of the collision.

The *Spindrift* improperly neglected to keep out of the way of the *Jennie S. Barker*.

A proper look-out was not kept on board the *Spindrift*.

Those on board the *Spindrift* improperly neglected to hail or otherwise warn the *Jennie S. Barker* that the *Spindrift* was stopped.

The said collision was caused by the negligence and improper navigation of the *Spindrift*, and was not caused by any negligence of those on board the *Jennie S. Barker*.

On the 14th of July last the principal cause came on to be heard together with the cross-cause, on oral evidence before the

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judge, assisted by two of the elder brethren of the Trinity Corporation.

The effect of the evidence appears from the judgment.

Milward, Q.C., and *E. C. Clarkson*, for the owners of the *Spindrift*. The only article of the regulations for preventing collisions at sea applicable to the present case is article 20, and the *Jennie S. Barker* was in fault for not taking ordinary precautions as required by that article. The *Spindrift* was hove to, with her engines stopped. She was therefore neither "proceeding" under article 14, or "crossing" within article 15. So far there is distinct authority in the case of *The Helvetia*, decided both in this Court and on appeal before the Judicial Committee of the Privy Council. (1) With regard to article 17, it may be said that it was only meant to apply to a case where the overtaking and the overtaken vessel were both in motion; but at any rate in this case the barque was the overtaking vessel, and it was incumbent on her, by the terms of that rule, to keep out of the way of the *Spindrift*.

Butt, Q.C., and *W. C. Gully*, for the owners of the *Jennie S. Barker*. The circumstances in the case of *The Helvetia* (1) were different to those in the present case. In *The Helvetia* (1) the steam tug on which it was sought to lay the blame of the collision was not "under steam," whilst here the *Spindrift* could, on the evidence, have moved out of the way by either going ahead or astern. Moreover, there was nothing here to lead the master of the *Jennie S. Barker* to suppose that the *Spindrift* was not under command, and would not, on sailing vessels approaching, keep out of their way.

SIR ROBERT PHILLIMORE. In my judgment the case of *The Helvetia* (1) has not any application to this case, as the circumstances are so different.

In this case the steam tug *Spindrift* was hove to in a fairway channel, and the duty of a steam tug in this position is no doubt a question of considerable importance. I have consulted with the elder brethren of the Trinity House as to this case, and especially

(1) Not reported.

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upon the consequences which would ensue from laying down the law that a steam tug in such a position is to be considered a sailing vessel, or a vessel at anchor with no obligation to get out of the way of a sailing vessel. I think I am bound to come to the conclusion that a steam tug that places herself, as I have said, in the fairway of a channel, hove to, is bound to keep herself in readiness to move out of the way of other vessels, especially in such weather as is proved to have existed at the time.

The evidence, however, shews that there was not due vigilance displayed by the steam tug on this occasion. There was no man at the starting gear when the order was given to go ahead; and one of the witnesses produced on behalf of the *Spindrift* (the mate) very fairly and properly stated, that when the vessel was hove to in this way, there was no one to execute the order to go ahead at the time. The elder brethren think that the master of the barque was well founded in the observation that one stroke or two would have carried the steam tug ahead if the order had been complied with, and the steam tug had started forwards with that object.

It has been said that the barque was to blame for starboarding her helm, but there is the greatest improbability that this had any effect in bringing about the collision, and I am bound to say that the evidence has not removed that improbability from my mind. It is to be remembered—and upon this point I have had the advantage of conferring with the elder brethren—that the evidence establishes that she was deep in the water, that her tonnage was great, that there was a strong wind on her beam, and that she had very little canvas. The evidence of her master is, that she did not answer her starboard helm before the collision. In these circumstances the elder brethren think, and I agree with them, that the statement on behalf of the *Jennie S. Barker* is one that they have no reason to disbelieve. Therefore, looking to all the circumstances of the case, I can come to no other conclusion than that the *Spindrift* must be pronounced alone to blame for this collision.

Solicitors for owners of the *Spindrift: Hull, Stone, & Fletcher.*
Solicitors for owners of the *Jennie S. Barker: Bateson & Co.*

July 30.

THE ZETA. (7292.)

Salvage—Construction of s. 450 *of the Merchant Shipping Act,* 1854 (17 & 18 *Vict. c.* 104).

PD 40

The plaintiffs in a salvage suit claimed salvage for the following services;—they found a barge adrift in the river Thames, without any one on board of her, and they restored her to her owners:—

Held, that the 450th section of the Merchant Shipping Act, 1854, did not apply, and that the neglect of the plaintiffs to deliver the barge to the receiver of wreck of the district did not operate as a forfeiture of their claim to salvage.

THIS was an appeal from the City of London Court.

The following special case, which had been settled by agreement between the counsel for the appellants and respondents, was filed on the registry:—

This is a cause of salvage instituted in the City of London Court, on the 3rd day of April, 1875, on behalf of Alfred Waller and Joseph Chapman, of Blackwall, in the County of Middlesex, against the owners of the barge *Zeta*, and the cargo laden on board her, in the sum of 50*l.*

The plaintiffs are both licensed watermen, and the defendants are coal merchants and barge owners.

The plaintiffs' case, as stated by counsel on the hearing of the cause, was that between twelve and one o'clock, on the 18th day of March, 1875, the plaintiffs, who were in their own boat, near the West India Dock, in the river Thames, observed a barge (which proved to be the *Zeta*) adrift near the north shore. The plaintiffs rowed towards her, and boarded her between West India Dock and Blackwall Stairs; on getting on board they found that the *Zeta* was laden with about fifty tons of coal, drifting with no person on board, the head-fast rope appearing to have parted.

That the plaintiffs succeeded in bringing the *Zeta* up at a causeway about six feet wide, and subsequently moored her at the Northumberland Coal Wharf, and subsequently the defendants' servants took charge of her there. For the above services the suit was instituted. The value of the said barge is estimated at 150*l.*, and her cargo at about 46*l.*

The plaintiffs sent in a claim to the defendants for salvage, but the defendants denied any liability in respect of any claim in the nature of salvage.

On the 22nd day of April, 1875, the case came on for hearing in the said Court, before Mr. Commissioner Kerr, and on hearing counsel for the plaintiffs (who stated the facts, as above set out), and without hearing any witnesses for either side, or counsel for the defendants, the learned commissioner was of opinion that, even assuming that the plaintiffs had earned or become entitled to any salvage reward (which was not admitted by the defendants), they had forfeited any claim thereto, by not taking and delivering the *Zeta* to the receiver of wreck (according to the provisions of the Merchant Shipping Act, 1854, s. 450).

The plaintiffs contended that the section of the said Act did not apply.

The learned commissioner ruled that the section of the said Act applied, and that the plaintiffs had forfeited their claim to salvage by not complying with the provisions of the said section, and therefore dismissed the suit.

The question for the opinion of the High Court of Admiralty is whether (on the above facts) the learned commissioner was right in ruling that s. 450 of the Merchant Shipping Act applied, and that the plaintiffs had forfeited their claim to salvage by not complying with the provisions of the said section.

If the Court should be of opinion in the affirmative the appeal is to be dismissed with costs.

If the Court should be of opinion in the negative, then this case is to be remitted to the City of London Court for hearing, and the costs of this appeal are to abide the event.

The appeal was heard on the 30th of July last.

W. G. F. Phillimore for the appellants, the owners of the *Zeta*. The 450th section of the Merchant Shipping Act, 1854, has no application to a case like the present. In the first place, that section only relates to persons finding wreck and taking possession of it with an intention of defrauding the owners. The provisions of the section are highly penal, and must receive a reasonable construction. It could never have been the intention of the legislature to impose a penalty on salvors who have delivered up possession of property to its undoubted owners. Indeed, it has been judicially laid down that salvors, on the completion of a salvage service, should give up possession to the owners of the salved property, and do not by so doing lose their right to remuneration: *The Champion*. (1) Again, the section only speaks of "wreck." Now the word wreck is used in the Merchant Shipping Act in two different senses—in the sense as interpreted by the interpretation clause (s. 2), when it includes jetsam, flotsam, lagan, and derelict; or in the sense used in that portion of the Act in which s. 450 occurs, i.e. as meaning fragments or portions of property saved. That this is so is obvious from s. 458, in which a distinction is drawn between vessels or boats in distress and wreck. But can it be even said that the *Zeta* was derelict; for it cannot successfully be contended that the property was jetsam, flotsam, or lagan? Property is said to be derelict where there has been an

(1) B. & L. 69.

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abandonment without hope of recovery, and not as was the case here, where the owners of the property left it with the intention of returning: *The Clarisse* (1); *The Aquila.* (2)

R. E. Webster for the respondents. The provisions of the 450th section were obviously meant to meet such cases as the one now before the Court. The *Zeta* was clearly a wreck within the meaning of the interpretation clause, for it is provided that wreck shall include flotsam, jetsam, lagan, and derelict; that is, wreck shall mean not only wreck, but also something more than what is ordinarily known as wreck. The property in this case, if not, strictly speaking, derelict, might certainly not inaptly be described as wreck. [He referred to Pritchard's Digest, p. 986.]

SIR ROBERT PHILLIMORE. I am of opinion that the 450th section of the Merchant Shipping Act, 1854, does not apply to a case of this kind. This is the case of a barge adrift near the West India Dock, in the river Thames, and I think the reasonable inference is that she had been left moored, and had parted from her moorings. It appears to me that it would be quite wrong to put upon this clause of the statute such a construction as is contended for, and to hold that the barge was a wreck in the sense of the interpretation clause. (3) The term derelict applies where the vessel has been left sine spe recuperandi and sine animo revertendi. I adhere to what I said in *The Clarisse* (1); and I entirely agree in what was said in regard to derelicts by that great master of maritime law, Lord Stowell, in the case of the *Aquila.* (2)

I think it proper to express an opinion with regard to the real point as to the construction of the statute. I do not consider that it was intended to apply to salvors who have found a derelict vessel and have restored it to her owners. I cannot conceive that such a construction can be put upon the Act as this, namely, that although the salvors did restore the derelict vessel to the owners according to the principles of maritime law, as it was their duty to do, that they were to pay, nevertheless, double the value to the

(1) Sw. 129.
(2) 1 Rob. 37.
(3) See *Palmer* v. *Rouse*, 3 H. & N. 505; 27 L. J. (Ex.) 437.

owners, and perhaps a penalty of 100*l.*, for what is called an improper detention. This is a criminal clause in the statute, and is meant to apply to a criminal and improper detention, whereby it was sought to practise a fraud upon the Crown or the owner, and not to apply to cases of this description. I think it unnecessary to make any further remarks upon that point, and I must send this case back again to the learned judge of the City of London Court for trial.

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Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Farnfield.*

[IN THE ARCHES COURT OF CANTERBURY.]

July 16.

THE OFFICE OF THE JUDGE PROMOTED BY JENKINS *v.* COOK.

Refusal to administer the Holy Communion—Canons 26 *and* 27*—Personality of the Devil—Punishment after Death—Church Discipline Act*, 3 *&* 4 *Vict. c.* 86.

A parishioner published a book of selections from the Old and New Testament, and designedly omitted therefrom passages relating to the personality of the devil and to the existence of punishment for sin after death.

In correspondence with the vicar of the parish he stated that the omitted passages were in their generally received sense in his opinion quite incompatible with religion or decency. The vicar, after seeking the advice of the bishop of the diocese, refused to administer the Sacrament of the Lord's Supper to the parishioner. The bishop of the diocese, when the vicar sought his advice, either gave no order or direction in the matter or gave an order or direction which was obeyed by the vicar:—

Held, that the conduct of the vicar was not such as to render him a criminous clerk subject to the provisions of the Church Discipline Act.

Semble, that the parishioner was disqualified from receiving the Sacrament of the Lord's Supper.

Rev. in P.C. 1 Prob. D. 86

THIS case came before the Court by virtue of letters of request signed by the Bishop of Gloucester and Bristol, after a commission of inquiry, under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86), had reported that there were primâ facie grounds for further proceedings being taken, at the promotion of Mr. Henry Jenkins, a parishioner of Christ Church, Clifton, against the Rev. Flavel Smith Cook, vicar of the parish, for

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JENKINS v. COOK.

having infringed the ecclesiastical law by refusing, when officiating as minister in the said church on Sunday, the 4th of October, 1874, to administer the Sacrament of the Holy Communion to the said Henry Jenkins. The letters of request were duly accepted by the Dean of Arches on the 21st of January last, and an appearance having been entered on behalf of the defendant, articles were exhibited, which, omitting those merely formal, were in substance as follows:—

'That for the last six years past the said Henry Jenkins, the promoter in this cause, has been, and still is, an inhabitant and parishioner of the said parish of Christ Church, Clifton. That he is a member of the Church of England, and has, during the last six years, regularly attended divine service on Sundays at the parish church, Clifton, aforesaid, and has also, during such period, been in the habit of receiving the Holy Communion in the said church monthly. During his attendance at divine service in such church, as aforesaid, he has always conducted himself reverently, joining in the responses in accordance with the directions of the rubric. That he believes in the inspiration of the canonical books of the Old and New Testament; that Scripture contains all things necessary for salvation; and the doctrine of the atonement of the sins of mankind by the death of our Lord and Saviour Jesus Christ on the cross; and that in proof of the premises the said promoter exhibits and hereunto annexes and prays to be read and taken as part hereof a certain book, being Prayers for a Week, by the said Henry Jenkins, and which said book of family prayers has been published by the said Henry Jenkins, and is regularly used by him at family prayer in his own house.

That on the 28th day of September, 1874, the said Henry Jenkins gave notice to the Rev. Flavel Smith Cook of his intention to present himself at his church to receive the Holy Communion at the midday service on the following Sunday, the 4th day of October, 1874, by a letter or notice, which was duly received by the said Rev. Flavel Smith Cook prior to the said 4th day of October, 1875.

That the said Henry Jenkins, as a parishioner of Christ Church Clifton aforesaid, attended the said mid-day service with the intention of being a partaker of the Holy Communion, which had been announced to be administered in the said church at the mid-day service on that day. After the reading of the morning prayers and the preaching of the sermon at the said midday service, you, the said Rev. Flavel Smith Cook, being assisted by your curate, the Rev. Grant E. Thomas, proceeded to read the service or Order of Administration of the Lord's Supper and Holy Communion, and that whilst you, with the assistance of your said curate, were engaged in administering the Holy Communion to some of your parishioners and others who offered themselves to receive the same, the said Henry Jenkins proceeded towards the holy table, and presented himself, meekly kneeling on his knees before the holy table, to receive the same along with other members of the congregation; but that, notwithstanding the premises, you, the said Rev. Flavel Smith Cook, being the minister who delivered at the said celebration of the said Holy Communion the bread to the communicants, without any lawful cause, and when it came to the turn of the said Henry Jenkins to receive the bread of

the Holy Communion, passed intentionally over him and omitted and refused to deliver to him the bread of the Holy Communion.

That afterwards your said curate, the said Grant E. Thomas, who at such celebration of the Holy Communion delivered the cup to the communicants, when it came to the turn of the said Henry Jenkins to receive the cup of the Holy Communion intentionally passed him over and omitted and refused to deliver to him the cup of the Blessed Sacrament of our Lord in the presence and with the sanction of you, the Rev. Flavel Smith Cook, as such vicar as aforesaid, and that the said Henry Jenkins was on such occasions obliged, contrary to his wish and inclination, to leave the said holy table without receiving the Holy Communion.

The admission of the articles was not opposed, and the proctor for the defendant having given a negative issue thereto, filed a responsive plea. This responsive plea, after stating the publication by the promoter in the year 1865, of a volume entitled Selections from the Old and New Testament (1), and the examination thereof by the defendant after the receipt of a letter from the promoter complaining of a certain sermon preached by the defendant as unreligious in tendency, set out certain letters between the promoter and the defendant in reference to the said volume. (2) In one of these letters, written on the 20th of July, 1874, the promoter avowed in effect that the omissions in his book of Selections from the Old and New Testament were made because the passages so omitted were in their generally received sense incompatible with religion or decency; whilst in another, in reply to a letter from the defendant intimating that until the promoter should disavow his "perversions and denials," he would not be received as a communicant. The responsive plea then proceeded as follows:—

8. On the 28th of September the promoter wrote to the defendant to the effect that he intended to attend the mid-day service at Christ Church, Clifton, as a communicant on the next Sunday, October 4th, 1874.

9. After the said 25th day of July, 1874, and before the defendant called upon

(1) This volume, to which the promoter craved to refer as if it were annexed and formed part of the responsive plea, consisted of extracts from the Old and New Testaments, without preface or comment, but with asterisks denoting where passages had been omitted. Among the passages omitted were passages immediately relating to the personality or existence of the devil and to the punishment of sin after death.

(2) These letters are set out in extenso in the judgment.

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the right reverend the bishop of the diocese, as hereinafter mentioned, the promoter communicated with the said lord bishop in reference to the matters hereinbefore presented.

10. On the 2nd day of October, 1874, the defendant called on the said lord bishop, and was desirous to submit to the said lord bishop all the facts hereinbefore mentioned, so far as the same were known to him, and all the letters hereinbefore set forth, and particularly the said letter dated the 20th of July, 1874; and the defendant began to state the same facts, and to read the said letters to the said lord bishop; but the said lord bishop, without hearing the whole of the said statement and the said letter from the defendant, said that he had the whole matter before him, insomuch that the promoter had communicated with him therein, and informed the defendant that he had decided not to make or pronounce any order or direction in the premises, and had so informed the promoter; and had signified further to the promoter that he, the promoter, might take proceedings against the defendant in the Consistory Court of the said diocese. The said lord bishop, further understanding that the defendant would refuse to administer the elements of the Holy Communion to the promoter, said that he, the promoter, would probably complain formally to him, the said lord bishop; upon which he, the said lord bishop, would apply formally to the defendant for a formal statement of his reasons for so refusing.

11. No notice was received by the defendant of any such complaint of the promoter to the said lord bishop as aforesaid, nor was the defendant ever called on by the said lord bishop for such statement of his reasons for refusing to administer the elements of the Holy Communion to the promoter as aforesaid, nor did the defendant receive any communication from the said lord bishop relating to the premises other than or until the notice of the intention of the said lord bishop to issue his commission under 3 & 4 Vict. c. 86, as hereinafter mentioned.

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12. On the 2nd day of October, 1874, after leaving the said lord bishop, the defendant wrote and sent to the promoter the following letter:—

"Clifton, Oct. 2, 1874.

"Dear Sir,—I have received your note giving me notice that you intend to appear at the celebration of the Communion next Sunday. It is now my solemn duty to inform you that I cannot receive you as a communicant, inasmuch as you have published a book omitting certain portions of God's Holy Word, and have given me in writing your reasons for doing so. This I consider as constituting, besides the hindering and slandering of His Word, the offence specified in the 27th canon, and I am conscientiously bound to obey that canon. My course, therefore, is clear, and I shall unhesitatingly follow it. I do, however, feel how grievous the scandal may be for such a case to come before the courts of this country, and I do invite you to consider whether it may not be your duty so to respect the consciences of others and the general peace of the church, as voluntarily to withdraw from my congregation, and not to put me to the melancholy and painful necessity of acting, as I am resolved to act, if you present yourself,

. . . . .

"Believe me, in sorrow of heart for you, to remain,

"Yours faithfully,

"Flavel Cook."

13. The defendant, on the 4th of October, 1874, refused to deliver to the promoter, or permit the promoter to receive, the elements of the Holy Communion when he presented himself to receive the same, for and on account of the writing and publishing by the promoter of the said letters, and for and on account of his causing to be printed and published the said volume of Selections from the Old and New Testament, and for no other cause or reason whatsoever.

14. A complaint was made by the promoter to the said lord bishop of the defendant having so refused to administer to him the elements of the Holy Communion, on the 19th day of October, 1874. The said lord bishop issued and sent to the defendant a notice of his intention to issue a commission in the premises under and by virtue of 3 & 4 Vict. c. 86, on the 29th day of October, 1874. The said commission was issued by the said lord bishop on the 18th day of November, 1874. No order or direction in the premises, otherwise than by the issue of the said notice and the said commission, was, so far as the defendant is aware, ever made or pronounced by the said lord bishop in the premises.

15. The defendant submits and alleges that he was and is entitled and compelled by the laws ecclesiastical of this realm to refuse to administer the Holy Communion to the promoter under the circumstances and for the causes and reasons hereinbefore appearing.

16. The defendant, further, would have been at all times and now is ready and willing to admit the promoter to the Holy Communion in the said parish church if the promoter had been or now were willing to disavow such opinions on the part of the promoter, as by the laws ecclesiastical of the realm rendered it the duty of a minister of the Church of England to refuse to administer to him the Holy Communion, and particularly if the promoter had been and now were willing to withdraw his said letter to the defendant dated the 20th day of July, 1874 (1); but the promoter has always refused to disavow such conduct as aforesaid, or to withdraw his said letter.

An allegation in reply to the responsive plea was brought in by the proctors for the promoter, which, after denying that the averments in the said responsive plea were any defence to the suit, and admitting the publication of "The Selections" and the letters set out in the same responsive plea, other than the said letter of the 20th of July, 1874, written by the promoter to the defendant (1), alleged substantially, and so far as material to this report, as follows:—

5. That as to the 9th, 10th, 11th, and 14th articles of the said plea, the proctors for the promoter say that the defendant, by letter dated the 31st day of July, 1874, informed the lord bishop of the diocese of his having warned the promoter that he could not be received at the Lord's Table of his parish church not on any of the grounds of exclusion mentioned in the rubric, but on the ground that he held certain opinions in relation to Satan and evil spirits. The lord

(1) This letter is set out in the judgment in extenso, post, p. 478.

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bishop's answer to the said letter, dated August 2nd, 1874, intimated to the defendant his serious doubt whether, under the circumstances specified, the repulsion of the promoter from the Lord's Table would be upheld by a court of law. That the defendant, on appearing before the lord bishop on the 2nd day of October, 1874, proceeded to justify his determination to repel the promoter from the Lord's Table, and did not ask or seek the advice of the lord bishop in reference to the matter. That, on complaint being made to the lord bishop by the promoter of his repulsion, on the 4th of October, 1874, from the Lord's Table of his parish church by the defendant, the said lord bishop being well aware, from his correspondence and communication with the defendant, that the ground on which he had excluded the promoter from the Holy Communion was not one of the causes of exclusion specified in the rubric, gave no order or direction in the matter, but issued the said commission of inquiry to enable the defendant (if so minded) to take the opinion of a court of law as to whether there were grounds sufficient in law to warrant the exclusion of the promoter from the Lord's Table, and that, save as hereinbefore averred, the proctors for the promoter deny the averments in the said 9th, 10th, 11th, and 14th articles.

6. That they deny the averments in the 15th article of the said plea.

On the 22nd of June last the case came on to be heard, and the hearing was continued on the 24th of June. At the hearing the Bishop of Gloucester and Bristol and another witness were examined orally on behalf of the promoter. The evidence of these witnesses and the material documentary evidence produced at the hearing on behalf of the promoter and defendant sufficiently appear from the judgment.

Dr. Deane, Q.C., and *Dr. Tristram* (*A. Charles* with them), for the promoter. It has been settled law since the case of *Middleton* v. *Crofts* (1), that the canons of 1603 do not proprio vigore bind the laity; the defendant therefore cannot, as against the promoter, rely upon the provisions of the 26th and 27th of these canons, or contend with any success that the breach of either of these canons would justify the refusal of the Communion to the promoter. In fact, the ecclesiastical law as to the administration of the Communion to laymen is to be found, and only to be found, in the Acts of Uniformity and the Book of Common Prayer. The only grounds upon which a layman can lawfully be repelled are enumerated in the rubric prefixed to the Communion Service, and if the promoter had denied any of the fundamental doctrines of the Christian religion the action of the defendant might be justi-

(1) 2 Atk. 650.

fiable, as the denial of such doctrines would have constituted the promoter an open and notorious evil liver. When, however, the facts admitted on the pleadings are considered, what pretence can there be for so describing him? If it is to be admitted that the canons of 1603 furnish the rule of law in this case, this startling proposition of law must be true, namely, that it would be imperative on every clergyman of the Church of England to refuse admission to the Communion to any person by whom the supremacy of the Crown in cases ecclesiastical might be impugned. So also, whilst the Test Acts were in force, an incumbent would have possessed the power to have shut out any layman repelled by him from all hope of accepting office or employment under the Crown. The promoter is a member of the Church of England and a parishioner of Christ Church, Clifton, and has for the last six years, and until the occasion out of which this suit has arisen, been admitted as a communicant by the defendant. He has therefore clearly established a primâ facie right in himself to have the Communion administered to him, and in these circumstances the onus of proving that a legal cause existed for his repulsion lies on those who represent the defendant.

[SIR ROBERT PHILLIMORE. In my opinion it is for the counsel for the incumbent to shew that there was sufficient cause for refusal.]

A. J. Stephens, Q.C., and *Jeune*, for the defendant. The defendant committed no offence under the Church Discipline Act (3 & 4 Vict. c. 86) in withholding the Communion from the promoter on Sunday, the 4th of October last. In so refusing to receive the defendant as a communicant, the defendant did no more than his duty as a clergyman of the Church of England, and acted strictly in accordance with the provisions of the Act of Uniformity of Car. 1., and the canons of 1603. The Act of Uniformity and the canons of 1603 give a qualified discretion to the minister or curate to withhold the Communion from a parishioner provisionally, and until such time as a legal decision can be had as to the right of the parishioner repelled to be admitted to that sacrament. The constituted authority by whom this legal decision is to be given appears clearly from the 3rd paragraph of the rubric before the Communion Service to be the bishop of the

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diocese in person. Now in this case the bishop in person has never given any decision, and until he has so done the jurisdiction of this Court can in no way attach. On this ground alone the defendant ought to be dismissed from the suit. The words of the rubric are explicit, "that the ordinary shall proceed against the offending person according to the canon," whilst the 27th canon provides in effect that "every minister repelling any, as is specified in the same or the next preceding constitution"—canon 26—"shall, upon complaint, or being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction." Among the persons who are specified in this 27th canon are "common and notorious depravers of the Book of Common Prayer." Now the promoter, if the letters written by him to the defendant and the Book of Selections he has published are taken into consideration, must be held to come within this description. It follows, therefore, that after the defendant, in provisionally excluding the promoter from the Communion, had conformed to the law, the bishop of the diocese was bound, upon complaint being made to him by the promoter, not to have issued a commission, but to have personally decided the matter in dispute by either confirming or terminating the temporary exclusion of the promoter. In fact, the incumbent of a parish who may have repelled any person in a bonâ fide exercise of his discretion is entitled to have his discretion checked by the bishop of the diocese, and no proceeding under the Church Discipline Act can legally be taken against him, provided he obeys the decision of the bishop, even if it turns out that the discretion to so provisionally repel had been improperly exercised. Moreover it is not necessary to go into the question whether the defendant referred the cause of repulsion to the ordinary, and sought his advice. It is enough that the promoter complained to the bishop, for from that time the bishop became seised of the case, and the responsibility of the defendant was at an end.

In the second place, even if this Court does possess any jurisdiction to inquire into the refusal of the defendant to admit the promoter as a communicant, yet the promoter, before such refusal, had committed a spiritual offence by hindering and slandering the word of God, and by depraving the Book

of Common Prayer, especially the Order for the Administration of the Communion, the Apostles' and the Nicene Creeds, and therefore, his exclusion until he should repent of his sins was clearly justifiable. That this is so, apart from the 27th canon before referred to, appears manifest when the proper construction is put on the rubrics and the exhortation before the Communion Service. [They referred to Dwarris on Statutes, 2nd ed., p. 574; *Lyde* v. *Barnard.* (1)] The Exhortation preparatory to the Communion Service is indeed not merely directory, but also prohibitory, enumerating three classes of sins which disqualify a person from being admitted to the Communion: spiritual sins, or sins against the faith, sins against charity, and sins against morality. Consequently the term, "common and notorious evil liver," in the 3rd paragraph of the ante-communion rubric, must be construed as including those who have committed any of the same three classes of sins. The preamble of the Act of Uniformity of Car. 1, of itself shews that at the time of that Act the spiritual offences of unbelief or misbelief were dealt with penally as "evil living." The language of 13 & 14 Car. 2, c. 33, "An Act for the prevention of the printing of seditious, treasonable, and unlicensed books," leads to the same conclusion. If, then, blasphemers of God, and those who hinder and slander God's word, are liable to punishment in the courts of this country (*Cowan* v. *Milbourn* (2); *Gathercole's Case* (3); and see cases collected in Stephen's Ecclesiastical Statutes, vol. i. p. 667)—such offenders must be included among those who are debarred from admission to the Communion. Now the letter of the 20th of July, 1874,—a letter addressed to the defendant in his official capacity—sufficiently shews that the promoter has committed a spiritual sin, and both hindered and slandered the word of God as well as depraved the Book of Common Prayer; for although the book published by the promoter under the title of Selections from the Old and New Testament would of itself be no foundation for any charge against him, yet, when it is considered in connection with this letter of the 20th of July, the case is very different, as in that letter the reasons of the promoter for

(1) 1 M. & W. 101. (2) Law Rep. 2 Ex. 230, 234.
(3) 2 Lewin, Cr. C. 237.

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omitting very many portions of Scripture become apparent, namely, that in his opinion the passages left out in the book are incompatible with either religion or decency. Out of the Old Testament the promoter has omitted no less than 215 entire chapters, and out of the New Testament 25 entire chapters. Thus he has struck out all passages both in the Old and in the New Testament where any mention is made of Satan under any name, or any mention of evil spirits, as well as all passages containing any plain mention of any punishment after this life. That the promoter therefore has hindered and slandered the word of God, and is by reason thereof a "notorious evil liver," admits of no doubt. He has also depraved the Book of Common Prayer. For example, he has discarded as incompatible with religion many of the Gospels appointed to be read in the Communion Service and set out in the Book of Common Prayer—either the entire gospel or portions thereof—and many of the lessons which are appointed as portions of the Morning Service. It has been argued that the canons of 1603 do not bind the laity, and that, as a consequence, the provisions of canon 27 cannot be material to this case, but that is not so, for the only question here is whether the conduct of the defendant—a clergyman confessedly bound to obey the canons: *Mastin* v. *Escot* (1)—has been criminal or not. In connection with the argument that the rubric in the Communion Service is to be read together with the canons of 1603 and the preliminary Exhortation, so as to extend the class of persons the minister is bound provisionally to repel from the communion, it is material to notice that King Charles' declaration concerning ecclesiastical affairs, issued on the 25th October, 1660 A.D., especially enjoins that "all possible diligence be used for the instruction and reformation of scandalous offenders whom the minister shall not suffer to partake of the Lord's Table until they have openly declared themselves to have truly repented and amended their former naughty lives, as is partly expressed in the rubric and more fully in the canons:" Cardwell's Conferences, p. 293. It is also extremely significant, as shewing the discretion placed in the minister, with an appeal to the ordinary, that in 1662, at the last revision of the Prayer Book, the words contained in the Exhortation above re-

(1) 4 Moo. P. C. 104.

ferred to, "If any of you be a blasphemer of God, or hinderer or slanderer of His word," were moved to their present place in the Communion Service from the place they formerly occupied in former prayer books, and from the exhortation appointed to be read after the communicants had assembled to partake of the Communion, and also that the passage in the rubric requiring notice to be given to the ordinary by the minister repelling and the direction to the ordinary to proceed according to the canon, were then for the first time added; thus shewing clearly that it was the intention of the framers of our present Prayer Book that the passage so placed in the preliminary Exhortation should form part of the law designating those who were not to be admitted to the Communion without repentance. That such was the intention of the Puritan party at the Savoy Conference appears from one of the exceptions given in on their behalf: "We desire the minister's power both to admit and keep from the Lord's Table may be according to His Majesty's declaration, 25th Oct., 1660" [quoting the declaration above set out]: Cardwell's Conferences, p. 317.

Dr. Deane, Q.C., and *Dr. Tristram.* The promoter was not repelled by the defendant on account of misbelief or unbelief in any of the fundamental doctrines of the Church of England. For repulsion on such grounds the law has plainly provided. What authority, however, is there for holding that the personality of Satan is an article of faith necessary for salvation and a thing to be believed under pain of exclusion from the Communion? No such authority has been produced on behalf of the defendant. It is also said that the promoter is disqualified to be a communicant because it must be inferred that he does not believe in everlasting punishment after death, but everlasting punishment is also not such a fundamental doctrine of the English Church that a man can be punished for doubting it: *Wilson* v. *Fendall.* (1) The promoter is by no means a common or notorious depraver of the Book of Common Prayer. What is really meant by a "common and notorious depraver" in the 27th canon is seen when the corresponding words in the Latin version, "frequenter et

(1) 2 Moo. P. C. (N.S.) 375. 10 Jur. N.S. 406.

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notorie calumniator," are considered. If this be done it becomes obvious that the passage is only directed against those who rejected the Book of Common Prayer altogether. But even if the promoter could be said to come under the description of a depraver of the Book of Common Prayer, it surely cannot be that the defendant, by sheltering himself under the provisions of the canon—a private ordinance—can deprive the promoter of his right as a parishioner to be admitted to the Communion. With respect to the question of jurisdiction, it must be acknowledged that by the repulsion of the promoter a great scandal has been brought upon the Church. Does it not follow as a consequence that the propriety of the repulsion is within the terms of the Church Discipline Act (3 & 4 Vict. c. 86), and that on that ground the question of the legality of the conduct of the defendant can be tried in this Court? The promoter, a layman, in order to enforce his rights, must have recourse to the Church Discipline Act, and the provision in the rubric as to the reference within fourteen days to the ordinary and the direction of the ordinary only lays down the mode of enforcing the law as between the ordinary and the clergyman, and cannot affect the rights of third persons. The defendant, however, although he claims protection under the proviso as to notices in the rubric, has not even brought himself within its terms, for the refusal, in respect of which the suit is brought, occurred on the 4th of October, and no mention thereof was made to the bishop until so late as December the 23rd. No order or direction has ever been made by the bishop in the matter, and moreover, if any order had been made confirming the exclusion of the promoter this suit would still have lain against the defendant. It has been contended that the promoter was only provisionally repelled, but the evidence and the correspondence in the case clearly proves that the exclusion was deliberate and permanent, and intended so to be. There is no evidence at all that the promoter is a "common and notorious evil liver." The letter on which the defendant relies is a private letter written privately to the defendant on a privileged occasion, and indeed it never could have been the intention of the Church of England, from the time of the Reformation downwards, to exclude a layman from the Communion simply because he might entertain erroneous views on certain portions of

the Scriptures of mysterious import and doubtful interpretation. To constitute an open and notorious evil liver there must be evidence of an immoral life, or an amount of irreligion much greater than the evidence in this case proves. Up to the time when the canons of 1603 were promulgated it is quite clear that lay members of the Church of England could only be excluded from the Communion for lawful cause. [They referred to 1 Edw. 6, c. 1, s. 1.] Now in the 2nd Prayer Book of Edward VI. and the Prayer Book of Elizabeth, what is lawful cause is defined by the rubric before the Communion Service, whilst the same causes of exclusion are to be found in the corresponding rubric in our present Prayer Book. Is it not likely that if the reasons for exclusion from the Communion mentioned in the canons were lawful, and it had been intended by the legislature that the causes on account of which the minister might lawfully repel, should be different from those enumerated in the 1st Prayer Book of Edward VI., additional words for that purpose would have been added to the rubric when the Prayer Book was revised long after the issue of the canons of 1603?

Cur. adv. vult.

July 16. SIR ROBERT PHILLIMORE. I retain the opinion which I expressed on accepting the letters of request in this case, namely, that it was one especially proper for the cognizance of the bishop of the diocese; and I regret, that in his Lordship's opinion, circumstances had rendered it unfit that he should exercise his episcopal jurisdiction in this matter. It is my duty, however, to deal with the subject thus presented to me according to the best of my ability without the great advantage of the bishop's judgment thereupon.

The history of the proceedings taken in the case, so far as it is necessary to state them, is as follows:—

Upon the 18th of November, 1874, the bishop of Gloucester and Bristol issued a commission under 3 & 4 Vict. c. 86, to inquire into and report upon a charge preferred by Mr. Henry Jenkins, a parishioner of the parish of Christ Church, Clifton, against the Rev. Flavel Smith Cook, a clerk in holy orders, in the diocese of Gloucester and Bristol, and vicar of his parish, for

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illegally and without any just cause or reason, and contrary to his duty in that behalf, refusing when he was officiating minister to administer the sacrament of the Holy Communion to Mr. Jenkins.

The commission was duly holden, and after the examination of a witness, and after hearing counsel on both sides, the commissioners reported that the majority of them considered that there was sufficient primâ facie ground for instituting further proceedings against Mr. Cook.

Subsequently Mr. Jenkins obtained the permission of the bishop to promote his office by letters of request to the Court of Arches.

On the 19th of February, 1875, articles were filed against Mr. Cook. They charge that the promoter being a parishioner of the defendant's parish, a member of the Church of England, and having during the last six years regularly attended divine service on Sundays at his parish church, having been in the habit of receiving the Holy Communion in his church monthly, having always conducted himself reverently in church, joining in the responses in accordance with the directions of the rubric, believing in the inspiration of the canonical books of the Old and New Testament, that Scripture contained all things necessary for salvation, and in the doctrine of the atonement of the sins of mankind by the death of Our Lord on the cross, and having published and using a certain volume of family prayers, which is annexed, was, on Sunday, the 4th of October, 1874, after having given the legal notice, and having duly presented himself to receive the Holy Communion, refused the Communion by the defendant.

The defendant put in a responsive plea, the substance of which will be stated hereafter, and there was an allegation in reply.

The case came on for hearing before me on the 22nd and 24th of June, and I took time to consider the judgment which I am now about to deliver.

The contention of the promoter is, that being a parishioner, and having given due notice of his intention to be a communicant on the following Sunday, he did so present himself, and was repelled by the defendant. I thought that when these facts were proved the burden of proof was shifted, and that it was for the defendant to shew that he had adequate reasons for this repulsion. The defendant undertook to discharge this burden by

proving that the promoter had published a work called Selections from the Old and New Testament, and had written letters to shew that he made these selections more especially because he did not believe in the eternity of punishment, or, indeed, as it would appear from the passages omitted, in the punishment of sin at all, or in the existence or personality of the devil, or in other matters of importance.

It was admitted, properly, in my opinion, that the publishing a volume of extracts from the Old and New Testament without preface or comment, and with asterisks denoting where passages were omitted, was not per se an offence which warranted the refusal of the Holy Communion to the author of the work. The letters, however, gave a different colour to the matter, shewing quo animo the omissions were made, and being tantamount to a denial of the doctrine and the truth of the facts contained in the omitted passages.

The correspondence put in evidence comprises letters between the defendant and the promoter, between the defendant and the bishop, between the promoter and the bishop, and between the solicitors of the parties.

The defendant takes up in substance two grounds of defence.

First, that, whether the reasons alleged by him were valid or invalid, he is not, having regard to his conduct and the particular law on the subject, a criminous clerk subject to the provisions of the Clergy Discipline Act.

Secondly, that his reasons for refusal were legally and morally valid, and that therefore he has committed no offence against the law ecclesiastical.

The two lines of defence perhaps sometimes cross one another, but on the whole they are sufficiently distinct. I proceed to consider them in their order.

With reference to the first line of defence, it becomes necessary to enter a little into the history of the present case.

It appears that in the year 1865 the promoter published a volume entitled, Selections from the Old and New Testament. This volume he presented to the defendant, who seems never to have examined it until after the 6th of July, 1874. On the Sunday before that day, the defendant had preached a sermon in

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his parish church, and on the next day he received the following letter from the promoter:—

"My dear Sir, "Clifton, 6 July, 1874.

"As one of your parishioners who accepts his conscience as the voice of God speaking within him, I beg to protest most emphatically against the irreligious tendency of your sermon of last night. I quite believe that you would not willingly deceive others, but it is my opinion that no difficulties as to language or books should stifle what is imprinted in every man's breast by his Maker, that is to say, the knowledge of right and wrong.

"I am, my dear sir,

"Yours very sincerely,

"Henry Jenkins."

I learn from subsequent correspondence, that this letter was caused by the defendant having maintained the doctrine of eternal punishment, which the promoter characterises in subsequent letters addressed to the bishop as an "irreligious," "disgusting," and "impious" doctrine.

It appears that the defendant, who had then for the first time examined the book sent by the promoter, and discovered that many important parts of Holy Scripture were omitted in it, called upon the promoter with the object of enlightening and rebuking him, both as to his letter and book; but he refused to hear any communication on the subject. His wife, however, who has been examined as a witness, called upon the defendant and endeavoured unsuccessfully to persuade him that her husband was justified in his conduct.

On the 20th of July, the promoter again wrote to the defendant. The letter was as follows:—

"My dear Sir, "Clifton, 20 July, 1874.

"Mrs. Jenkins has kindly called upon you in order to arrange matters, with, I am afraid, very poor success. With regard to my book, Selections from the Old and New Testament, the parts I have omitted, and which has enabled me to use the book morning and evening in my family, are in their present generally received sense quite incompatible with religion or decency (in my opinion). How such ideas have become con-

nected with a book containing everything that is necessary for a man to know I really cannot say, and can only sincerely regret it.

"I am, my dear sir,

"Yours very sincerely,

"The Rev. Flavel Cook, Clifton." "Henry Jenkins.

1 R. D. 92.

It is very important to observe the language of this letter, because it contains a declaration that the passages omitted are so omitted on the ground that, as generally understood, they are incompatible with religion or decency. During the hearing, I urged more than once upon the counsel for both parties the propriety of the following arrangement, viz. that the promoter should withdraw the letter, and the defendant thereupon should admit him to the Lord's table. The defendant expressed himself as being willing and ready to adopt my suggestion; but I regret to say that after deliberation the promoter refused to withdraw the letter, and hence the continuance of this suit.

I believe that, of the Old Testament, 215 chapters are omitted altogether, and 25 of the New Testament; and there are besides numerous omissions of portions of chapters.

I will take, for example, the Gospel of St. Matthew. In that gospel the omissions are as follows:—

The whole of the first chapter, including the history of the birth of our Lord.

Chapter III. Several verses of St. John the Baptist's preaching.

Chapter IV. The fasting and temptation of our Lord.

Chapter V. Passages relating to the crime of killing and anger towards and abuse of a brother, and the commission of adultery.

Chapter VII. Passages relating to entering in at the strait gate, and as to trees not bringing forth good fruit being hewn down, and the condemnation of those who have worked iniquity, though they have prophesied and cast out devils.

In Chapter VIII. are omitted the passages relating to the expulsion of devils, that relating to those who are to be and those who are not to be admitted into heaven, and our Lord's refusal to allow the burial of a father to excuse a disciple from following him.

Chapter IX. The passages relating to the expulsion of devils.

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Chapter X. Passages exhorting men not to fear those who can only kill the body but not the soul, and the passage in which our Lord says that he is come to send a sword, not peace, upon earth.

In fact, of the twenty-eight chapters of St. Matthew, only five, I think (II., VI., XIV., XXVII., XXVIII.), have escaped mutilation by the omission of important passages, besides those relating to the eternity of punishment and the personality of the devil.

I return to the correspondence. The next letter is as follows:—

"Dear Sir, "Clifton, 24 July, 1874.

"It would be a great relief to me if I could find in your letter of 20th instant, or in any other communication written or spoken, something to shew that I have misunderstood your opinions, or that you have changed them for the better.

"Unhappily, the conclusion I cannot but form from your letters, words, and printed Selections from the Old and New Testament, is that, of set purpose, you reject very many portions of Holy Scripture. That you have, for instance, cut out as you have from the Bible what is therein written concerning Satan and evil spirits is to me terrible evidence of how far you have allowed yourself to go in mutilating the word of God.

"Large differences of opinion concerning scriptural matters no prudent or charitable minister of the Gospel would condemn, but there are perversions and denials which no faithful minister will sanction, lest he allow unbelief a recognised place in the Church of Christ. With such perversions and denials I grieve to say I am driven to connect yourself. While they remain not retracted or disavowed you cannot be received at the Lord's table in my church. I hope you will feel that my course is directed by conscience, and not by resentment. I quite forgive your behaviour when I called, and, although you would then listen to nothing, if you will converse quietly with me, my time shall willingly be given for that purpose. May the Spirit of Truth deliver you from the errors you have adopted; and in hope of seeing this my prayer answered, "I remain, dear Sir,

"Yours faithfully,

"Henry Jenkins, Esq." "Flavel Cook.

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The answer to this is as follows:—

"My dear Sir, "Clifton, 25 July, 1874.

"Thinking as you do, I do not see what other course you could consistently have taken. I shall, nevertheless, come to the Lord's Table as usual at 'your' church, which is also mine.

"I am, my dear Sir,

"Yours very sincerely,

"Henry Jenkins.

"The Rev. Flavel Cook."

The next letter is from the defendant to his bishop:—

"My Lord, "Edinburgh, 31 July, 1874.

"Supposing myself bound by rubric so to do, I write to inform your lordship that on the 25th instant I warned one of my parishioners, Mr. Henry Jenkins, that he could not be received at the Lord's table in my church while certain opinions held by him remain not retracted or disavowed.

"By word and in writing, also in print, he had committed himself to very serious opposition to the word of God. I may specify the rejection of belief in the existence of Satan and evil spirits. He acknowledged in reply to my warning of refusal to admit him to the Lord's table that he thought I could take no other course, yet appears to signify that he purposes to disregard my action, and present himself as usual.

"If necessary, I will of course furnish particulars of the matter.

"I have the honour to remain, my lord,

"Your lordship's obedient servant,

"Flavel Cook.

"P.S.—Any letter addressed to my residence, Christ Church Vicarage, Clifton, will find me.

"The Right Reverend

"The Lord Bishop of Gloucester and Bristol."

To this letter the answer was as follows:—

"My dear Sir, "The Palace, Gloucester, 2 August, 1874.

"I hasten to acknowledge your note, dated Edinburgh, July 31. "As you notify a fact rather than ask advice about a contemplated course, I cannot obtrude what is not asked, but I

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may still properly intimate to you my serious doubt whether, under the circumstances specified, repulsion would be sustained by a court of law. Feeling the great importance of the matter I write at once and am

"Faithfully yours,

"Rev. F. Cook." "Charles Gloucester and Bristol.

The next letter in order is from the promoter to the bishop, which I presume was received after the bishop had sent the last letter to the defendant:—

"My Lord, "Clifton, 2 August, 1874.

"At morning service to-day, Mr. Cook, the vicar of Christ Church, Clifton, has refused to administer the Holy Communion to me (through the medium of his curate). Now as I am not an open and 'notorious evil liver,' and as I have not denied any article of the creed, perhaps you may think it desirable to ask him why he commits this scandal in the church, to say nothing of the particular outrage upon me. Some time ago, Mr. Cook preached two sermons, with the special object of supporting the doctrine of eternal punishment. As a parishioner, I wrote to protest against the irreligious tendency of these sermons. In the course of the controversy, my disbelief in the devil was discovered, and also that in my book, Selections from the Old and New Testament, I had omitted those passages which seemed to favour those remarkable doctrines. I very much regret the necessity for omitting those passages, and should be delighted if some more wholesome meaning could be attached to them. I have thought it my duty to write this letter, but from what I have said your lordship will perceive that Mr. Cook very probably considers that in treating me thus he only carries out the principles of the Church of England to their legitimate conclusion; for I believe Mr. Cook's opinions, however extraordinary, are perfectly orthodox.

"I am, my lord,

"Your lordship's obedient servant,

"Henry Jenkins."

The last sentence of this letter contains, I may observe, a remarkable admission. The bishop sent the following answer:—

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"My dear Sir, "Palace, Gloucester, 3 August, 1874.

"I much regret the occurrence which you specify. The Church of England has not, I believe, anywhere laid down rules relative to refusal to the Holy Communion other than those prefatory to the service and the 26th, 27th, and 109th canons. These, I gather from your letter, do not apply to your case.

"It might, I think, justly be inferred from the service itself, that a communicant should fully believe in the articles of the Nicene Creed. These, I conceive, you would be willing heartily to accept.

"If this be so, I think you have a reasonable cause of complaint; but as the matter may come before me in my court, I do not feel able at present to say more.

"I shall feel it my duty to attend to any further communication on this matter which you may desire to make.

"Very faithfully yours,

"C. J. Gloucester and Bristol."

In this letter it will be observed no reference is made to the letter which the bishop had received from the defendant, which had apprised the bishop of the distinct grounds of his refusal, nor to the bishop's opinion upon those grounds, nor is there any comment made upon the avowal of the promoter that he disbelieved in the existence of the devil and in the doctrine of eternal punishment. The reply to this letter has not been produced before me. I think the bishop said it had been lost. But it is clear that the promoter had not availed himself of the bishop's suggestion that he should express his belief in the Nicene Creed, for the next letter was as follows:—

"My dear Sir, "Palace, Gloucester, 13 August, 1874.

"After careful correspondence and inquiry I find that Mr. Thomas" [that is, the curate of Mr. Cook] "refused you the Holy Communion, partly because notice was not given according to the rubric, but mainly because he regarded you to be a common and notorious depraver of the Book of Common Prayer and of the Articles in certain special details, which he was prepared, if need be, to specify in open court or otherwise.

"This being alleged to be the case, and it being also doubtful

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from your letter to me whether you accept the creed which forms a portion of the service, I do not feel that I can personally further interpose in the matter, but should you desire it, I shall be quite willing to entertain the question if brought before me in my court.

"Very faithfully yours,

"H. Jenkins, Esq." "C. J. Gloucester and Bristol.

This letter the promoter answers as follows:—

"Weston-super-Mare,

"My Lord, 14 August, 1874.

"I have not alluded to the Nicene Creed, except to say that I did not allude to it. The Apostles' Creed (the one placed over the communion table in Christ Church) I still think less involved and more in accordance, on the whole, with what we are told on the subject. I do not think it necessary to notice Mr. Thomas's objections, but the reason Mr. Cook refused me the Sacrament is very intelligible. In speaking to my wife he said, 'Let him tell me that he believes in the devil and I will give him the Sacrament.' In his opinion, therefore, this is the passport to the ordinance. I beg to acknowledge the receipt of your letter.

"And am, my lord,

"Your lordship's obedient servant,

"Henry Jenkins."

The next letter is from the bishop, and is as follows:—

"My dear Sir, Gloucester, 15 August, 1874.

"To prevent any mistake allow me to add that I have only to do with the clergyman who actually refused you, and with the reasons which he assigned. These I took especial care to obtain in an accurate form, and they are as stated in my last letter.

"Very faithfully yours,

"H. Jenkins, Esq." "C. J. Gloucester and Bristol.

The information to which the bishop refers is contained in two letters of Mr. Thomas, the curate, which were inclosed in a later letter, dated September 16, sent by the bishop to the promoter.

The two following letters continue the correspondence between the promoter and the bishop.

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"My Lord, "Clifton, 6 September, 1874.

"Mr. Thomas has this morning again refused to give me the Sacrament. Now, whatever a 'common and notorious depraver of the Book of Common Prayer' may mean as applied to a man who values the book only second to the Bible itself, the reason why I am debarred from partaking of the Holy Communion is sufficiently 'notorious.' It is because, forsooth, I ventured to protest against the disgusting and impious doctrines set forth by Mr. Cook in the two sermons to which I have referred. My Lord, it is a grievous misfortune if your power will not indeed allow you to check such unjustifiable and scandalous proceedings on the part of your subordinates.

"I am, my lord,

"Your lordship's obedient servant,

"Henry Jenkins."

"My dear Sir, "Gloucester, 14 September, 1874.

"I have just returned after a short absence on the Continent. Hence the delay in reply. I have, as I implied, either in a former letter or through Canon Mather, this grave difficulty, viz. that I do not yet clearly understand whether you do or do not heartily and ex animo accept the creed which forms a part of the Communion Service. While that doubt remains I cannot conscientiously take any action. As I before said, I have been greatly pained by the whole matter.

"Very faithfully yours,

"C. J. Gloucester and Bristol."

There then appears to have been a letter from the promoter to the bishop, which was not produced before me.

The next letter I have is from the bishop as follows:—

"My dear Sir, "Gloucester, 16 September, 1874.

"Excuse my saying that you do not realize the difficulties of the case. Let me state them:—

"First, I have nothing to do with anyone except the minister actually repelling.

"Secondly, I learn from him after careful inquiry the grounds on which he does so; viz. principally, 'that you were a common

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and notorious depraver of the Book of Common Prayer and of the Articles, in certain particulars which he was prepared to specify. This I have already mentioned to you.

"Whether these statements can be legally sustained I am not prepared to say. Into this, however, I had resolved not to enter, but was prepared, if I found from your answers that you accepted the creed that forms a part of the Communion Service, to direct, under the 27th canon, that you should no longer be refused, as being of honest life and conversation, and holding the fundamental articles of the Christian faith.

"Unfortunately, on the subject of your acceptance or non-acceptance of the creed which forms a part of the service, I do not obtain, and have not yet obtained, any such clear answer as would, in my judgment, warrant me in personally interposing and over-riding the judgment of the clergyman; still I now, as previously, wish to do you all possible justice, and so add, as before, that I will entertain the question if formally brought before me in my court; the question being one of legal difficulty, whether you can be considered to come under the fair construction of the 27th canon.

"As I wish in so painful a matter to act with the fullest consideration of your feelings, I inclose Mr. Thomas's letter, with the reasons in extenso. This please return to me. I am also quite willing that you should go to my friend and legal adviser, Mr. Clarke, shew to him this and my other letters, and be guided by his friendly advice.

"I think I must have made it plain throughout how deeply I regret the whole matter. Still I cannot and must not set aside the deliberate and reasoned judgment of one of my clergy, unless it be made more clear than it now is to me that I am morally justified in doing so.

"Very respectfully yours,

"C. J. Gloucester and Bristol."

Mr. Thomas's letters, which are part of the evidence in the suit, were inclosed in the last letter.

In answer to the letter of the 16th of September from the bishop to the promoter, the promoter appears to have written

another letter which was not produced, and then I have the following letter from the bishop to the promoter:—

"My dear Sir, "Gloucester, 18 September, 1874.

"I return the note you have kindly sent. I venture to hope that my last note may have put matters in a clear light. Mr. Cook's case will be, that you, by omissions, the design of which you have admitted orally and in writing, have come under the 27th canon. Personally, I doubt much whether this would be the ruling of any competent Court; but, in my official capacity, especially under the circumstances I have already mentioned in a former note, I ought not to foreclose a fairly arguable case.

"Very faithfully yours,

"C. J. Gloucester and Bristol."

It appears that on the 2nd of October, 1874, the defendant had an interview with the bishop upon the subject of his intended refusal of the Holy Communion to the promoter on Sunday, the 4th of October, notice having been given on the 28th of September by the promoter, according to the rubric, of his intention to communicate on the 4th of October. As to this interview the bishop himself gave evidence in court, and connected with it there is a document written in pencil by him to which I will presently advert. His lordship said that he had no memoranda of the details of the conversation, which had faded from his memory, and which he had completely forgotten. He said that to the best of his remembrance he did not give the defendant advice but assistance; that his general impression was that the defendant said he was conscientiously bound to continue to refuse the Holy Communion to the promoter, and that he did not "collect categorically that Mr. Cook (the defendant) would obey his judgment."

But upon cross-examination a document in pencil was shewn to his lordship, which he admitted both to be in his handwriting and to have been given by him to the defendant as the answer which he would advise him to send to the promoter.

This document is as follows:—

"I have received your note giving me, &c.

"I fear it is my solemn duty now to inform you that I cannot receive you as a communicant, inasmuch as you have published a

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book omitting certain portions of God's holy word, and have given me in writing your reasons for doing so.

"This I solemnly believe to constitute the offence specified in the 27th canon, and believing it, I am conscientiously bound to obey that canon.

"My course, therefore, is clear, and I shall, unhesitating, follow it.

"I do, however, feel how grievous the scandal may be for such a case to come on; it must come before the Courts of the country, and I do invite you to consider whether it may not be your duty so to respect the consciences of others and the general peace of the church, as voluntarily to withdraw from my congregation, and not to put me to the melancholy and painful necessity of acting as I am resolved to act if you present yourself."

This memorandum, the bishop said in his evidence, was written by him to assist the defendant in the expression of his (the defendant's) opinion. It was adopted by the defendant as his own, and sent with additional remarks by him to the promoter. Another letter, which I thought myself bound to admit, though marked "private," is as follows. It is dated, it will be observed, after the repelling of the promoter, an event which occurred on Sunday, the 4th of October, two days after the interview of the defendant with the bishop, and which repelling alone is made the subject of charge in the articles.

"(Private.)

"My dear Mr. Cook, "Gloucester, 23 November, 1874.

"I have carefully thought over our short conversation, and think now that there seems to be some daylight for us all.

"But we must, of course, be very careful. It has occurred to me, therefore, that any part I may have had in drawing up the letter which you wrote to Mr. Jenkins, or even any approval of it, should carefully be suppressed. It will not legally aid your case, and it will make my interposition less effective. So, as much as you can, keep me out of it. I shall be more free, and more able to bring matters to a peaceful solution.

"Very faithfully yours,

"C. J. Gloucester and Bristol."

The only comment which I think it necessary to make upon these letters will be with reference to their bearing upon the point of law relied upon by the defendant, to which I will presently advert.

Such being the facts of the case, I will now endeavour to discover and apply the law which is applicable to them.

I think it unnecessary to enter upon a discussion of the principles of the general ecclesiastical law upon this particular subject, inasmuch as specific provisions of our church are to be found in the canons of 1603 and in the rubrics to the present Prayer Book. It has been argued, indeed, that the rubric alone is applicable to them. But I am not of that opinion. As I have always been taught and learnt, the rubric is to be construed, wherever it is possible, so as to agree with the canons. Many authorities might be cited for this proposition; but it really seems to me one of an elementary character. In this particular instance the rubric, as it will be seen, itself refers to the canon.

And with respect to the other argument that the canons are not binding on the laity after the decision of Lord Hardwicke in *Middleton* v. *Crofts* (1), not to say that this proposition is too broadly stated and requires some qualification, it appears to me quite inapplicable to the present case, which is a proceeding against a clergyman in an ecclesiastical court for an offence against the ecclesiastical law.

In *Escott* v. *Mastin* (2), which was referred to, but I think infelicitously, by the counsel for the promoter, the layman put in force against the clergyman the punishment prescribed by the canon alone for the offence; and here I may add that this case itself is one of the authorities for both propositions, namely, that the canons are binding upon the clergy and that the rubric is to be construed with reference to them.

The canons to which I think it necessary to refer are the 26th and 27th.

Canon 26: "No minister shall in any wise admit to the receiving of the Holy Communion any of his cure or flock which be openly known to live in sin notorious, without repentance;

(1) 2 Atk. 650, 669.

(2) 4 Moo. P. C. 104.

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nor any who have maliciously and openly contended with their neighbours, until they shall be reconciled; nor any churchwardens or sidemen, who having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and that their faithful discharging of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury, either in neglecting or in refusing to present such of the said enormities and public offences as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there; although they may be urged by some of their neighbours, or by their minister, or by their ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible crime of perjury."

Canon 27: "No minister, when he celebrateth the Communion, shall wittingly administer the same to any but such as kneel, under pain of suspension; nor, under the like pain, to any that refuse to be present at public prayers according to the orders of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer and Administration of the Sacraments, and of the orders, rites, and ceremonies therein prescribed, or of anything that is contained in any of the Thirty-nine Articles agreed upon in the Convocation one thousand five hundred sixty and two, or of anything contained in the Book of ordering the Priests and Bishops; or to any that have spoken against and depraved His Majesty's sovereign authority in causes ecclesiastical: except every such person shall first acknowledge to the minister, before the churchwardens, his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his handwriting, to be delivered to the minister, and by him to the bishop of the diocese or ordinary of the place. Provided, that every minister so repelling any, as is specified either in this or in the next precedent constitution, shall upon complaint, or being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction."

I now turn to the rubrics prefixed to The Order of the Administration of the Lord's Supper or Holy Communion:

"So many as intend to be partakers of the Holy Communion shall signify their names to the curate, at least some time the day before.

"And if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended; the curate, having knowledge thereof, shall call him and advertise him that in any wise he presume not to come to the Lord's table until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties, to whom he hath done wrong; or at least declare himself to be in full purpose so to do, as soon as he conveniently may.

"The same order shall the curate use with those betwixt whom he perceiveth malice and hatred to reign; not suffering them to be partakers of the Lord's table until he know them to be reconciled. And if one of the parties so at variance be content to forgive from the bottom of his heart all that the other hath trespassed against him, and to make amends for that he himself hath offended; and if the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice; the minister in that case ought to admit the penitent person to the Holy Communion, and not him that is obstinate. Provided that every minister so repelling any, as is specified in this or the next precedent paragraph of this rubric, shall be obliged to give an account of the same to the ordinary within fourteen days at the farthest; and the ordinary shall proceed against the offending person according to the canon."

The rubric of course receives a legitimate construction from the service to which it is prefixed. And in that service is to be found an Exhortation in which are the following words:—

". . . Therefore if any of you be a blasphemer of God, an hinderer or slanderer of his word, an adulterer, or be in malice, or envy, or in any other grievous crime, repent you of your sins, or else come not to that holy table; lest after the taking of that

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Holy Sacrament the devil enter into you as he entered into Judas, and fill you full of all iniquities and bring you to destruction both of body and soul."

I think that hinderers and slanderers of God's word are included in the category of evil livers specified in the rubric. It was admitted that these latter words could not be confined to persons guilty of immoral conduct. Indeed, from the contrary position an obvious absurdity would follow; for, in that case, a person might deny the fundamental doctrines of Christianity, and nevertheless claim his right to the reception of the Holy Communion.

The law of the Church of England derived from these sources appears to have been anxiously framed to accomplish two objects: on the one hand to impress on the parishioners the obligation of receiving the Sacrament of the Lord's Supper; on the other, to guard against the reception of it by those whose lives were not in conformity with the precepts of Christianity. It intended to secure the right of the worthy parishioner and to protect the clergyman in the execution of his duty to repel the unworthy parishioner. In what this unworthiness consists it has stated, partly in general, partly in specific terms. But in both instances it has thrown upon the clergyman the duty of deciding whether the conduct of the parishioner desirous of partaking of the sacrament did or did not incapacitate him from availing himself of that great but awful privilege. It placed the exercise of the discretion, according to the principles of ecclesiastical law, under the control and supervision of the ordinary, and upon him it cast the double duty, first, of advising the clergyman, and, secondly, if he agreed with his decision, of taking proceedings in Court pro salute animæ against the parishioner, in order that he might be brought into a state of penitence qualifying him for the reception of the sacrament, from which in his present condition he had been rightly repelled. The notion that a criminous layman as well as a criminous clerk is subject to ecclesiastical discipline has fallen into such comparative desuetude that this statement of the law may create surprise, but it is the law of the land. It is clear in any event, and this is the more important observation, that the clergyman is legally entitled to the advice and protection of his bishop in the exercise of this great responsibility.

I think the evidence fairly considered shews that the defendant sought this advice; and surely, as the bishop wrote the copy of the letter which the defendant was to send to the promoter justifying and adhering to his refusal, it cannot be successfully contended that the bishop did not sanction his conduct.

It does indeed appear that the bishop, unfortunately, I venture to think, corresponded with both parties separately, and, in his anxiety to make peace, wavered somewhat, perhaps, in the expression of his opinion, accordingly as he addressed the defendant or the promoter; but, nevertheless, the substantial result is that, if he did not, as I think he did, actually authorize the action of the defendant, he at least did not forbid it. How, then, has the clergyman offended against the ecclesiastical law as expressed either in the canons or the rubric? He had primâ facie ground for hesitating to administer the Holy Communion. He submitted that ground to his ordinary, and either received no "order and direction" from the ordinary at all, or received an "order and direction" which he has obeyed, and in either case has discharged his duty, and ought not to be made the subject of a criminal prosecution. It was contended before me in argument that he had infringed the law in not, within fourteen days after his refusal to administer the Sacrament to the promoter, giving an account of his refusal to the ordinary, according to the provisions of the rubric. But, in the first place, this is not an offence for which he is articled. In the second place, I think I must consider the rubric as being on this head directory only. And in the third place, such an account would have been nothing but the barest formality in this case, inasmuch as the bishop well knew, having been so apprised by the defendant on the 2nd of October, that the defendant was about to refuse the Sacrament to the promoter on Sunday the 4th, and that he had been previously refused on two occasions by the curate of the defendant, acting under his direction.

Though I am of opinion that the defendant has established his first defence, for the reasons which I have stated, at the same time I do not think that I ought to shrink from the examination of the second line of defence, namely, that the conduct of the promoter furnished a justification of the action of the defendant in repelling

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him from the Holy Communion as being under the canons and rubric disqualified from partaking thereof.

In considering for this purpose the conduct of the promoter, I must bear in mind not only that he has, in terms, denied the eternity of punishment and the existence of the devil, but also that he has expunged from the Bible, on the ground of their indecent and irreligious tendency, large portions, many of which relate to other grave and important doctrines of Christianity, and among which are to be enumerated several passages containing our Saviour's own words and precepts.

With respect to the absolute denial of the eternity of punishment—and here I must observe that many of the passages struck out relate not only to the eternity of punishment, but to any punishment for sin—I am of opinion that such a position is at variance with the plain teaching of the Church of England, expressed in her formularies, and especially in the Commination Service and the Athanasian Creed. And I am further of opinion that the decision of the Privy Council in *Fendall* v. *Wilson* (1) cannot be carried further than the passage which states the conclusion of their Lordships, and which is as follows:—"We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the formularies, to which this article refers, any such distinct declaration of our Church upon the subject, as to require us to condemn as penal the expression of hope by a clergyman that even the ultimate pardon of the wicked, who are condemned in the day of judgment, may be consistent with the will of Almighty God." The expression of such a hope is a very different thing from that absolute denial of the eternity of punishment which the promoter has declared.

The next subject for consideration is the denial by the promoter of the existence and personality of the devil. What is the teaching of the Church of England in her formularies on this subject? Has she spoken ambiguously or clearly? Professing upon this as upon other points to be guided by Holy Scripture, has she treated this matter as one of importance, or the contrary? The

(1) 2 Moo. P. C. (N.S.) 375. 10 Jur. N.S. 466

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Greek word ὁ διάβολος, which occurs in the New Testament, I believe, at least fifty-three times (1), is the usual rendering of the Hebrew word "Satan." To the signification "adversary" or "enemy" which "Satan" implied, the Greek word added that of "slanderer," or literally, "one who sets at variance by means of slander." The devil is represented in Holy Scripture as the spiritual enemy who slanders God to man and man to God. I will here avail myself of and adopt as my own the language used by a very learned person on this subject: "It would be a waste of time to prove that in various degrees of clearness the personal existence of a spirit of evil is revealed again and again in Scripture. Every quality, every action, which can indicate personality, is attributed to him in language which cannot be explained away. . . . . From the beginning of the Gospel, when he appears as the personal tempter of our Lord, through all the Gospels, Epistles, and Apocalypse, it is asserted, or implied, again and again, as a familiar and important truth. To refer this to mere 'accommodation' of the language of the Lord and his apostles to the ordinary Jewish belief, is to contradict facts and evade the meaning of words. The subject is not one on which error could be tolerated as unimportant; but one important, practical, and even awful. The language used respecting it is either truth or falsehood; and unless we impute error or deceit to the writers of the New Testament we must receive the doctrine of the existence of Satan as a certain doctrine of Revelation. Without dwelling on other passages, the plain, solemn, and unmetaphorical words of John viii. 44, must be sufficient: 'Ye are of your father the devil . . . He was a murderer from the beginning, and abides not in the truth . . . When he speaketh a lie, he speaketh of his own: for he is a liar, and the father of it.'" (2)

If this be a correct representation of the account given in Holy Scripture of the existence and personality of the devil, it would certainly be very strange if the Church of England had considered the belief in this existence and personality a matter of indiffer-

(1) Blunt's Dictionary of Theology, Voce Satan, p. 674, ed. 1872.

(2) Smith's Dictionary of the Bible, title Satan, vol. iii. pp. 1143–1145, ed. 1863.

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once—if indeed it had not considered such belief a necessary part of Christian teaching. I turn to her formularies and especially to her Prayer Book, which is often and truly said to be part of the statute, for information on this point. I find it under three heads: 1. Prayers; 2. Selections from Scripture; 3. Services.

1. In the Prayers I find the following passages:—

In the Litany:—"from the crafts and assaults of the *devil* . . . Good Lord, deliver us."

"from all the deceits of the world, the flesh, and the *devil*, Good Lord deliver us."

"That it may please thee . . . finally to beat down Satan under our feet,

"We beseech thee to hear us, good Lord."

". . . . and graciously hear us, that those evils which the craft and subtilty of the *devil* . . . . worketh against us be brought to nought:" Collect after the Litany.

Eighteenth Sunday after Trinity—The Collect:—"grant thy people grace to withstand the temptations of the world, the flesh and the *devil*."

2. As to selections from Scripture: Among the most remarkable is the Gospel for the Fifth Sunday after Epiphany, the 13th chapter of St. Matthew, containing the parable of the sower of the wheat and the tares. "The enemy that sowed," says the present Archbishop of Dublin, "the tares, we learn, 'is the devil,' so that we behold Satan here, not as he works beyond the limits of the Church, not as he deceives the world, but in his far deeper skill and malignity, as he at once mimics and counterworks the works of Christ. . . . . It is further noticeable with what remarkable distinctness the doctrine concerning Satan and his agency, his active hostility to the blessedness of man, of which there is so little in the Old Testament, comes out in our Lord's teaching in the New, as v. 19, 'then cometh the wicked one,' and here, 'the enemy that sowed them is the devil.' . . . . It was not till the Son of Man actually appeared on the stage of the world that Satan came distinctly forward upon it also, but the instant that the Saviour opens his ministry for the setting up of the Kingdom of God, at the same instant Satan starts forward as

the hinderer and adversary of it, the tempter of the Son of Man." (1) This seems to be the teaching of the Prayer Book, as is further shewn in the following passages:—

Epistle for the Sixth Sunday after the Epiphany: "He that committeth sin is of the *devil;* for the *devil* sinneth from the beginning. For this purpose the son of God was manifested, that he might destroy the works of the *devil:*" 1 St. John iii. 8.

First Sunday in Lent: The whole Gospel, St. Matthew iv. 1–12, relating to our Lord being "tempted of the *devil.*"

Wednesday before Easter: The Gospel, St. Luke xxii. 3. "Then entered *Satan* into Judas surnamed Iscariot."

Third Sunday after Trinity: The Epistle, 1 St. Peter v. 8. "Be sober, be vigilant; because your adversary the *devil,* as a roaring lion, walketh about, seeking whom he may devour."

Nineteenth Sunday after Trinity: The Epistle, Ephesians iv. 27. "Neither give place to the *devil.*"

Twenty-first Sunday after Trinity: The Epistle, Ephesians vi. 11. "That ye may be able to stand against the wiles of the *devil.*"

St. Michael and all Angels: For the Epistle, Revelations xii. 9. "And the great dragon was cast out, that old serpent called the *Devil* and Satan." Verse 12. "The *devil* is come down unto you having great wrath."

3. In the particular services I find the following passages:—

Baptismal Service:—"I demand therefore, "Dost thou in the name of this child renounce the *devil* and all his works? . . ."

"Grant that he may have power and strength to have victory, and to triumph against the *devil,* the world, and the flesh. . . ."

"We receive this child into the congregation of Christ's flock, and do sign him with the sign of the cross in token that hereafter he shall not be ashamed to confess the faith of Christ crucified, and manfully to fight under his banner against sin, the world, and the *devil.*"

Catechism:—Answer: "First, that I shall renounce the *devil* and all his works."

(1) Notes on the Parables, by R. C. Trench; Parable II., The Tares, pp. 68, 69, 70.

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Visitation of the sick:—Collect: " . . . Renew in him most loving Father whatsoever hath been decayed by the fraud and malice of the *devil*."

Consecration of an Archbishop or Bishop:—The Epistle, 1 Timothy iii. 6. "Not a novice, lest being lifted up with pride he fall into the condemnation of the *devil* . .. lest he fall into reproach and the snare of the *devil*."

Lastly, I will again cite what, with reference to this particular suit, is a passage of some importance, and has been already mentioned for another purpose. It is taken from an Exhortation in the Holy Communion Service, the Sunday before the celebration.

"Therefore, if any of you be a blasphemer of God, an hinderer or slanderer of his word, an adulterer, or be in malice, envy, or any other grievous crime, repent you of your sins, or else come not to that holy table; lest after the taking of that Holy Sacrament the *devil* enter you as he entered into Judas, and fill you full of all iniquities and bring you to destruction, both of body and soul." It is remarkable that this striking passage is to be found in both the Prayer Books of Edward VI. (1549, 1552), and also in the Order of the Communion of 1548, which is as follows:—

If a man be in any notable crime, "let him yet a while bewail his sins, and not come to this holy table, lest after the taking of this most blessed bread, the *devil* enter into him as he did into Judas, to fulfil in him all iniquity, and to bring him to destruction, both of body and soul." (1)

I must not omit reference to a very important formulary of the Church. In the Thirty-nine Articles there is this passage,—it occurs in the 17th Article: "For curious and carnal persons, lacking the Spirit of Christ, to have continually before their eyes the sentence of God's Predestination, is a most dangerous downfall, whereby the *Devil* doth thrust them either into desperation or into wretchlessness of most unclean living, no less perilous than desperation."

I think it unnecessary to travel further into a statement of the other passages of Scripture, grave and important as some of them

(1) Cardwell's Liturgies of Edward VI., pp. 429, 430.

are, which do not immediately relate to the eternity of punishment or the existence of the devil, and which are rejected by the promoter; because I am of opinion that the avowed and persistent denial of the existence and personality of the devil did, according to the law of the Church, as expressed in her canons and rubric, constitute the promoter "an evil liver," and "a depraver of the Book of Common Prayer and Administration of the Sacraments" in such sense as to warrant the defendant in refusing to administer the Holy Communion to him until he disavowed or withdrew his avowal of this heretical opinion; and that the same consideration applies to the absolute denial by the promoter of the doctrine of the eternity of punishment, and of course still more to the denial of all punishment for sin in a future state, which is the legitimate consequence of his deliberate exclusion of the passages of Scripture referrring to such punishment.

This disqualification of the promoter to receive the Holy Communion is not in my judgment removed either by the fact that he has published a volume of prayers taken from our Liturgy, or that he has expressed his belief in the inspiration of Holy Scripture. Nor do I stop to consider how such a declaration can be reconciled with his excision of those passages in Scripture to which I have referred.

I must consider therefore that the second as well as the first defence is established, and I must dismiss this suit with costs.

Proctor for promoter: *Pritchard.*
Proctors for defendant: *Moore & Currey.*

REGULÆ GENERALES.

ADDITIONAL RULES FOR THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Approved and confirmed by the Queen in Council, 12th of May, 1874.

At the Court at *Windsor*, the 12th day of *May*, 1874.

PRESENT:

The QUEEN's most Excellent Majesty in Council.

WHEREAS the Judge of the High Court of Admiralty has, in pursuance of the provisions of an Act passed in the Session of Parliament held in the third and fourth year of Her Majesty's Reign, intituled (cap. 65) "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," made and submitted certain Rules for the regulation of any proceedings that may be taken in the said Court under the Debtors Act, 1869, together with certain forms thereto annexed:

And whereas the said Rules have, in accordance with the provisions of the 10th section of the Debtors Act, 1869, received the approval of the Lord Chancellor:

And whereas the same have been this day laid before Her Majesty in Council:

Now therefore Her Majesty, having taken the said Articles and

Forms into consideration, was pleased, by and with the advice of Her Privy Council, to approve and confirm the same, and the said Rules and Forms (a copy whereof is hereunto annexed) are hereby approved and confirmed accordingly. And Her Majesty was further pleased to direct that the said Rules and Forms shall be additional Rules and Forms for the said High Court of Admiralty accordingly.

Whereof the Judge, Registrar, and other Officers of the said Court, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

Arthur Helps.

ADDITIONAL RULES FOR THE HIGH COURT OF ADMIRALTY OF ENGLAND.

The Right Honourable Sir Robert Joseph Phillimore, Knight, the Judge of the High Court of Admiralty of England, doth, in pursuance of the Act passed in the third and fourth year of Her Majesty's Reign, cap. 65, intituled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," and subject to the approval of Her Majesty in Council, make the following Rules for the regulation of any proceedings that may be taken in the said Court under the Debtors Act, 1869:—

I.

All applications to commit to prison under the Debtors Act, 1869, shall, in the first instance, be made to the Judge in Court by notice of motion, which shall specify the date and other particulars of the order in respect of the non-obedience to which the

application is made, and shall specify the amount due, and be endorsed with the name and address of the Proctor or party suing out the notice of motion, and when the Proctor actually suing out such notice of motion sues out the same as agent for a Proctor in the country, the name and address of such Proctor in the country shall also be endorsed on the notice of motion.

II.

The service of the notice of motion shall, whenever it may be practicable, be personal on the debtor, but if it appear to the Judge that reasonable efforts have been made to effect personal service, and either that the notice of motion has come to the knowledge of the debtor, or that he wilfully evades service, an order may be made as if personal service had been effected, upon such terms as to the Judge may seem fit.

III.

Proof of the means of the debtor shall, whenever practicable, be given by affidavit but if it appear to the Judge, either before or at the hearing, that a vivâ voce examination either of the debtor or of any other person, or the production of any documents, is necessary or expedient, an order may be made commanding the attendance of any such person before the Judge at a time or place to be therein mentioned, for the purpose of being examined on oath touching the matter in question, and an order may be made commanding the production of such documents. The disobedience to any such order shall be deemed a contempt of Court and be punishable accordingly.

IV.

The order of committal may be in the form or to the effect stated in the schedule A, annexed to these Rules, and shall, before delivery to the Marshal, be endorsed with the particulars required by Rule I. of these Rules.

V.

Upon payment of the sum or sums mentioned in the order

(including the fees due to the Marshal), the debtor shall be entitled to a certificate in the form of Schedule B annexed to these Rules signed by the Proctor or party actually suing out the order, and attested before an attorney or a justice of the peace.

VI.

The Marshal or his subordinate shall, within two days after the arrest, endorse on the order the true date of such arrest.

VII.

These Rules shall come into force as soon as they have been approved by Her Majesty in Council.

Dated this 12th day of March, 1874.

(Signed) Robert Phillimore,
Judge of the High Court of Admiralty
of England.

Approved,

(Signed) Cairns, C.

Schedule A.

Upon hearing, &c. [Christian and surname of the debtor and party claiming], I do order that the said A. B. be, for default of payment of the debt hereinafter mentioned, committed to [name of prison] prison for the term of weeks from the date of his arrest, including the day of such date, or until he shall pay *l.*, being the amount of [here state the particulars of the debt or liability], and which the said A. B. was, on the day of , ordered by the High Court of Admiralty of England to pay to the said , together with *l.* for costs of and attending this order; and I order that the Marshal or his substitute do take the said A. B. for the purpose aforesaid.

Dated

Judge of the High Court of Admiralty
of England.

SCHEDULE B.

I certify that A. B., now in the gaol of , upon an order of the High Court of Admiralty of England, at the instance of C. D., for non-payment of a debt of *l.*, has satisfied the said debt, together with the costs mentioned in the said order.

Dated this day of , 18 .

E. F., of, &c.

Proctor for the said C. D.,

or

C. D., of, &c.

Witness to the signature of C. D.,

G. H., his Attorney,

or

J. K. Justice of the Peace.

(Signed) ROBERT PHILLIMORE.

Approved,

CAIRNS, C.

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ADMIRALTY JURISDICTION—*Jurisdiction of the Court to entertain a Suit of Damage instituted against a Vessel belonging to the Khedive of Egypt —Sovereign Prince—Maritime Lien—Proceedings in Rem—Waiver of Privilege.*] In a cause of damage instituted by the owners, master, and crew of the *Batavier* against the vessel *Charkieh* and her freight, an appearance under protest was entered on behalf of His Highness the Khedive of Egypt and his Minister of Marine. A petition on protest was filed on their behalf, stating that the *Charkieh* was the property of the Khedive as reigning sovereign of the state of Egypt, and a public vessel of the government and semi-sovereign state of Egypt, and concluding with a prayer to the Court to declare that the vessel was not liable to arrest. It appeared from the answer filed on behalf of the plaintiffs, and from evidence which was adduced at the hearing of the petition on protest, that the *Charkieh*, though carrying the flag of the Ottoman navy, had come with cargo to England and had been entered at the Customs like an ordinary merchant ship, and that, at the time of the collision, which happened in the Thames, she was under charter to a British subject, and was advertised to carry cargo to Alexandria:—The Court held that the Khedive was not entitled to the privilege of a sovereign prince, and pronounced against the protest:—*Semble*, that a suit in rem to enforce a damage lien may be entertained without any violation of international law, though the owner of the res be the sovereign of a foreign state, and that such a suit may possibly be entertained even against property connected with the jus coronæ:—*Semble*, that if a sovereign assumes the character of a trader, and sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a sovereign. THE CHARKIEH (6200) - - 59

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2. —— *Possession—Mortgage—Jurisdiction to decide as to the Title to a Ship*—3 & 4 *Vict. c.* 65, *ss.* 3 & 4—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 11.] A British ship was mortgaged by an instrument that was in the form prescribed by the Merchant Shipping Act, 1854, and was duly registered. The mortgagor died intestate, and the mortgagees sold the ship under their power of sale, and executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mortgage money was indorsed on the mortgage and signed by the mortgagee, and produced to the registrar of shipping, who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mortgagor. In order to complete title of the purchaser a suit in rem was instituted on behalf of the mortgagee and purchaser, and in such suit the Court held it had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship. THE ROSE (6352) - - - - 6

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APPEAL TO ARCHES COURT—*Appeal from Visitation by Bishop as Ordinary—Jurisdiction—Appellate Jurisdiction exercised by Judge of the Arches—Power of the Bishop of the Diocese over the Fabric of the Cathedral Church of Exeter—Reredos—Legality of Carved Images not on any Tomb or in any Painted Window—3 & 4 Edw. 6, c. 10.*] A carved stone structure or screen at the back of the holy table, called a reredos, was erected in Exeter Cathedral by the Dean and Chapter of Exeter. On the structure were sculptured representations, in bas-relief, of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the day of Pentecost, and figures of angels, and the screen was surmounted by a cross.—The Bishop of Exeter, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed:—*Held*, by the Court of Arches, that it had jurisdiction to entertain an appeal from the judgment of the bishop:—*Held* also, that the structure was not illegal; that if it were illegal, the bishop had not jurisdiction to order its removal. Boyd *v.* Philpotts - - - 297

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APPEARANCE IN ARCHES COURT—*Practice—Proctor—Solicitor.*] A defendant in a suit in the Arches Court of Canterbury cannot enter an appearance otherwise than in person or by a proctor. Burch *v.* Reid - - - - 112

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BALDACCHINO — *Ornaments of the Church — Canopy over Communion-table.*] A baldacchino, or marble canopy, erected over the communion-table in a parish church is not to be an architectural decoration, but an unlawful ornament, for which a faculty cannot be granted. White *v.* Bowron - - - - - 207

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BOOK OF COMMON PRAYER—*Pleading—Particularity required as to Dates of Offences charged—Responsive Plea containing irrelevant Matter.*] Certain articles exhibited in a suit instituted by letters of request against the vicar of a parish, charged that the vicar, when officiating in the parish church and during divine service, on divers specified days, and on divers other days and times within two years next before the commencement of the suit, the precise dates whereof the promoter was unable to specify, had performed or sanctioned certain ceremonies alleged to be unlawful.—One of the articles charged the wearing when officiating in the Communion Service of divers dresses and things of divers forms and colours, and other than the habits appointed by law, without giving any specific description of the divers dresses and things complained of.—On motion to reject these articles:—*Held*, that they were admissible.—Articles in a responsive plea, stating that the suit was being promoted contrary to the wish and desire of the parishioners, and that the promoter had a pew in an Independent chapel, ordered to be struck out as irrelevant. Coombe *v.* Edwards - - - - 390

2. —— *Rites and Ceremonies of the Church—Lighted Candles during Morning Prayer—Ceremonial Crossing—Practice—Personal Answers—Singing the Agnus during the Communion Service.*] It is unlawful for a minister of the Church of England to use lighted candles on the communion-table or on a ledge immediately above the same during the performance of morning prayer when such candles are not wanted for the purpose of giving light; to cause to be said or sung during the performance of the service for the administration of the Holy Communion, after the prayer of consecration and before the reception of the elements by the communicants, the hymn or prayer known as the "Agnus."—*Hebbert* v. *Purchas* (Law Rep. 3 P. C. 605); *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 365) observed upon. Martin *v.* Mackonochie (Second Suit) - 279

BOOTY OF WAR—*3 & 4 Vict. c. 65, s. 22—Jurisdiction—Secretary of State for India in Council.*] The Court of Admiralty has no jurisdiction to decide any question concerning booty of war except such as is referred to it by Order in Council. By an Order in Council it was ordered that the claims of all persons to property captured during certain military operations should be referred to the judge of the High Court of Admiralty, who should make such order as to him should seem right both as to the persons who were and the proportions in which such persons were entitled to share therein. The judge, by decree, decided the matters so referred.—Afterwards certain persons entitled by the terms of the said decree to share in the captured property, alleged that certain portions of the captured property had not been distributed amongst the persons entitled, but were improperly withheld by one of Her Majesty's secretaries of state, and applied to the Court for a citation calling upon the secretary of state to enter an appearance and shew cause why a monition should not issue monishing him to bring the property in his hands into Court. The Court refused the application. Re The Banda and Kirwee Booty (2271) - - - - - - 436

BOTTOMRY—*Communication with Owner of Cargo—Bill of Exchange given as collateral Security.*] An American vessel laden with a cargo of timber, in the prosecution of a voyage, sustained damage, and was compelled to put into the Mauritius to repair and refit. She arrived there on the 11th of June, 1870, and her master, being without funds, placed the ship in the hands of H. & Co.,

BOTTOMRY—*continued.*

a firm at the Mauritius, and they, before any attempt had been made to obtain money on the personal credit of the owners of the ship, who were affluent merchants in New York, proposed to advance money for the repairs on the master's draft on London, on his giving a bottomry bond on the ship, freight, and cargo, as collateral security. The master and H. & Co., on the 29th of July, wrote to the owners of the ship, informing them of this proposal, and on the same day the master and H. & Co. wrote to the owners of the cargo, informing them that the vessel had sustained damage, and would have to undergo repair; but the letters to the owners of the cargo omitted all reference to the proposed loan on bottomry, and informed the owners of the cargo that they should hear further particulars by the next opportunity. The letters written by the master and H. & Co. to the owners of the ship were forwarded by the owners of the ship to the owners of the cargo; but the owners of the cargo did not receive these letters till the 8th of September, when it was too late for them to communicate with the master by post. On the 13th of October, after the repairs had been completed, the master gave bills and executed a bottomry bond on the ship, freight, and cargo, according to the terms of the proposal made by H. & Co., which had long before been assented to by him. The bills were made payable to H. & Co., and were drawn on B. & Co., their agents in London, at ninety days' sight. H. & Co. gave the master a memorandum, stating that the bills were taken as collateral security, and that the bond should be cancelled on the prompt payment by the owners of the vessel to B. & Co. of the amount of the bills. On the 15th of October the ship sailed from the Mauritius, and safely arrived at Liverpool, her port of discharge, on the 7th of February, 1871. After the ship had sailed, the owners of the cargo were for the first time informed by letter from H. & Co. that the bottomry bond had been given. The bond was transferred, and the bills of exchange were indorsed to B. & Co. Neither the master nor the owners of the vessel had any funds in the hands of B. & Co., and they neglected to provide funds to take up the bills, and informed B. & Co. that they had determined not to take up the bond.—In a suit to enforce the bond against the ship, freight, and cargo:—*Held*, that the bond was invalid as to the cargo, on the ground that there was not, under the circumstances of the case, such a communication with the owners of the cargo as to satisfy the law.—*Semble*, that the bond was also invalid as to the cargo, upon the ground that the prospect of benefit to the cargo was not such as to justify the master in granting a bottomry bond upon the cargo. The Onward (5662) - - 38

2. —— *Merger of Claim for Necessaries in Bottomree Bond—Jurisdiction of Court of Admiralty in a Cause transferred from a County Court—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3–8.] A suit for necessaries was instituted in the Swansea County Court against the owners, unknown, of a foreign brig, which was at the time of the institution of the suit at Swansea. The suit was afterwards transferred to this Court, and the plaintiffs filed

BOTTOMRY—*continued.*

their petition. It appeared from the petition that the claim of the plaintiffs was for money advanced by them to execute necessary repairs to the brig at a British port, and that the money was advanced on the security of an instrument, by which the master of the brig pledged himself and vessel, and her owners, for the repayment of the money, except in case of the total loss of the vessel on her intended voyage:—*Held*, 1. That the claim set forth by the petition was founded on bottomry; that the county court had no jurisdiction to entertain such a claim, and that as the cause was transferred to this Court from the county court, this Court had no jurisdiction to entertain the suit. 2. That it was not competent to the plaintiffs, upon the facts stated in the petition, to waive the instrument of bottomry and insist on their claim for necessaries, because the claim for necessaries must be considered to be merged in the instrument of bottomry. The Elpis (6161) 1

3. —— *Master's Wages—Marshalling of Assets.*] The master of a French lugger executed bottomree bonds on ship, freight, and cargo, and bound himself personally by the bonds. The ship arrived at her port of destination, and the bonds were indorsed to the owners of the cargo, who instituted a suit against ship, freight, and cargo, to enforce payment of the bonds. The master afterwards instituted a suit against the ship and freight for wages. The proceeds of the ship were insufficient to pay the bonds; but the proceeds of the ship, together with the freight and the value of the cargo, were sufficient to pay the bonds as well as the wages of the master:—*Held*, that the master was entitled to have his wages paid out of the proceeds of the ship before any portion of that fund was appropriated to the payment of the amount due on the bonds. The Eugenie (6491 and 6524) - - - - - 123

BREACH OF DUTY BY SHIPOWNER—*Damage to Cargo—The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 6—*Breach of Duty or Breach of Contract.*] A ship was chartered to proceed to a port abroad and there take in cargo. The charterers instituted a suit against the ship, and in their petition alleged inter alia that the master of the ship improperly refused to proceed with the ship to the agreed port of loading and proceeded with her to another port:—*Held*, that such conduct on the part of the master did not constitute a breach of duty or breach of contract within the meaning of the 6th section of the Admiralty Court Act, 1861, and that the Court had no jurisdiction to entertain any claim for damages arising therefrom. The Dannebrog (6997) 386

BREACH OF REGULATIONS FOR PREVENTING COLLISIONS AT SEA—*Damage—Regulations for preventing Collisions at Sea—Construction of the 17th section of the Merchant Shipping Act Amendment Act*, 1873 (36 & 37 *Vict. c.* 85).] The 17th section of the Merchant Shipping Act Amendment Act, 1873, enacts: "If in any case of collision it is proved that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the

BREACH OF REGULATIONS FOR PREVENTING COLLISIONS AT SEA—*continued.*

Court that the circumstances of the case made departure from the regulation necessary:—*Held*, that this section applies only to cases of collision where there has been a material infringement of the regulations which by possibility might have caused or contributed to the collision. The Magnet (L. 172) - - - - 417

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BURIAL GROUND—Faculty to build schoolhouse - - - - 294
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CANDLES—Altar of church - - - 279
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CARGO—Bottomry—Communication with owner
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—— *Hebbert* v. *Purchas* (Law Rep. 3 P. C. 605) observed upon - - - 279
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—— *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 395) observed upon - - 279
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—— *The Freedom* (Law Rep. 2 P. C. 594) commented on - - - - 446
See Perils of the Seas.

—— *The Thomas Lee* (38 L. J. (Ad.) 37) overruled - - - - - 132
See Right to begin. 2.

CATHEDRAL—Bishop—Visitation - - 297
See Appeal to Arches Court.

CHANGE OF SOLICITOR—*Practice.*] A suit was instituted against a vessel, and an appearance entered by a firm of solicitors on behalf of the owner. A sum of money was paid into Court in lieu of bail, and the solicitors thereupon procured the release of the vessel, and incurred costs in defending the suit on behalf of the owner. Whilst the suit was pending, and before any sum had been paid to the said firm of solicitors on account of such costs, another firm of solicitors entered a second appearance in the same suit on behalf of the same defendant. On an application made on behalf of the firm of solicitors by whom the first appearance had been entered, the Court made an order setting aside the second appearance, and condemned the defendant in the costs of the motion. The Oneiza (6194—6196—6199) 36

CHURCH—Faculty for alteration - - 221
See Faculty to alter Church.

—— Officiating without leave - - 107
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CHURCH DISCIPLINE ACT, ss. 19, 23 - 107
See Letters of Request.

—— Ornament—Baldacchino - - 207
See Baldacchino.

CHURCHYARD—Inscription on gravestone 398
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See Salvage. 3.

CIVIL SUIT—Monition - - - 135
See Monition in Civil Suit.

COLLISION—Cost - - - - 187
See Compulsory Pilotage. 2.

—— Dumb barge—Lighter - - - 175
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—— Lighter—Lights - - - 238
See Lighter.

—— Regulations—Breach - - - 417
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—— Right to begin - - - 132, 213
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—— Steam ferry-boat - - - 198
See Steam Ferry-boat.

—— Steam tug - - - - 456
See Steam Tug.

—— Towing ship—Negligence - - 226
See Negligence of towing Ship.

COMMUNICATION WITH OWNER—Bottomry
See Bottomry. 1. [38

COMMUNION—Refusal - - - 463
See Lord's Supper.

COMPULSORY PILOTAGE—*Damage—Compulsory Pilotage in the Mersey—*21 & 22 *Vict. c. xcii., s.* 139—*Meaning of "proceed to Sea."*] A large steamship, bound for a foreign port and fully equipped for her voyage, left dock in the port of Liverpool about 11 p.m. She had a pilot on board, and those in charge of her intended to take her out to sea at once. But after she got into the river it was determined that she should anchor there for the night, and cross the bar in the morning. The pilot remained on board, and by his direction the vessel was brought up by her port anchor and sixty fathoms of chain. The ebb tide began to make soon after the vessel was brought up, and the pilot remained on deck until she was three-parts swung to the ebb. He then went into a house on the deck under the bridge, and left orders that he was to be called if he was wanted. Whilst he was in the deck-house the vessel parted her cable; the pilot came on deck almost immediately afterwards, and under his directions efforts were made to bring the vessel up by her starboard anchor, but it did not hold, and although her fires were banked and steam was up, the vessel was allowed to drift down the river until she came into collision with a ship at anchor:—*Held*, that the pilot was to blame for the collision, and that the vessel was "proceeding to sea," within the meaning of the Mersey Docks Consolidation Act, 1858, so as to render the employment of the pilot compulsory by law. The City of Cambridge (L. 76) - - - 161

2. —— *Costs.*] The defendants in a collision suit, by their answer, denied that their vessel was to blame, and also set up the defence of compulsory pilotage. The Court decided that their vessel was to blame, but dismissed the suit upon the ground that the defence of compulsory pilotage was established:—*Held*, that the plaintiff was not entitled to any portion of the costs of the suit. The Schwan (6500) - - - 187

CONFIRMATORY FACULTY—*Pleading—Application for Faculty for Removal of certain Additions and Articles placed in Parish Church without lawful Authority—Practice as to Retention of Causes of Faculty.*] The vicar and one of the churchwardens, and the parishioners and inhabitants of a parish, were cited in the Consistory Court of Lichfield to shew cause why a faculty should not be granted for the removal of certain additions and articles alleged to have been placed in the church without a faculty. An appearance was entered on behalf of the vicar and the said churchwarden. They brought in an act on petition which concluded with a prayer to the judge to direct the issue of a faculty confirming the placing of the said additions and articles in the church. The judge directed this prayer to be struck out of the act on petition:—*Held*, on appeal to the Arches Court of Canterbury, that the prayer ought not to have been struck out, and that the defendants below were entitled to pray for a confirmatory faculty without the issue of a fresh citation. Gardner *v.* Ellis - - - - 265

CONSOLIDATION OF CAUSES—*Salvage—Practice.*] Salvage suits may be consolidated on the motion of the plaintiffs and without the consent of the defendants.—A steam-tug attempting to render assistance to a ship exhibiting signals of distress may, in a case where such ship is afterwards salved by means of other assistance, be entitled to salvage reward, even though her efforts have been practically unavailing. (See the Merchant Shipping Act Amendment Act, 1873 (36 & 37 Vict. c. 85), s. 18.) The Melpomene (L. 64, 67) - - - - - 129

CONTRACT—Affreightment—Performance 13
See Freight.

CONTRACT OF AFFREIGHTMENT—Right to freight - - - - 13
See Freight.

COSTS—Collision - - - - 187
See Compulsory Pilotage. 2.

—— Notary - - - - - 194
See Costs of Notary.

—— Ship—Possession - - - 157
See County Court Jurisdiction.

COSTS OF NOTARY—*Taxation of Costs—Outport Charges—Agent not a Proctor or Solicitor.*] In an outport bill brought into the registry for taxation by a proctor who acted as proctor for parties in a cause, charges were made for work done in the cause by a notary at an outport. The notary was neither a proctor, an attorney, nor a solicitor. A portion of the work for which these charges were made was work connected with the preparation of briefs and affidavits in the cause, and was such as is usually done by solicitors. The charges for this portion of the work the Court disallowed. The City of Brussels (6438) - - - 194

COUNTER CLAIM—*Wages and Disbursements—The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 191.] In a cause of wages and disbursements instituted on behalf of a master, himself a co-owner, against other part owners, the defendants may plead in answer that on a balance of account between the plaintiff as master and co-owner and the defendants nothing is due to the plaintiff. The City of Mobile (L. 108) 191

COUNTY COURT—Admiralty Jurisdiction—Bottomry - - - - - 1
See Bottomry. 1.

COUNTY COURT ADMIRALTY JURISDICTION ACT, 1868, ss. 3–8 - - - 1
See Bottomry. 2.

COUNTY COURT JURISDICTION—*Costs—Possession Fees—Admiralty Jurisdiction.*] Where an Admiralty suit is instituted in a county court against a vessel which is under the arrest of the Court of Admiralty, it is unnecessary, so long as the vessel remains under such arrest, for the officer of the inferior court to incur expense in placing a person in possession, and a double set of possession fees will not be allowed. The Rio Lima (6471) - - - - - 157

—— - - - - - - - 13
See Freight.

CROSS SUIT—Admiralty—Security - 120
See Security to answer Judgment.

DAMAGE TO CARGO—Admiralty Court Act, 1861 - - - - - 386
See Breach of Duty by Shipowner.

—— Goods carried into port - - 170
See Goods carried into Port.

DERELICT—*Salvage.*] A ship on a voyage from Melbourne to London fell in with a derelict brigantine 220 miles to the westward of the Lizard, in the month of February, and put an officer and three hands on board her, who, under circumstances of great difficulty and danger, and after much hardship, brought her in safety to Liverpool. In a salvage suit instituted on behalf of the owners, master, and crew of the ship, the Court, after directing expenses incurred by the salvors to be paid to them out of the proceeds of the salved property, awarded more than a moiety of the residue as salvage reward. The Rasche (L. 77) - - - - - - 127

DUMB BARGE—*Collision—Dumb Barge not bound to carry a Light in the Thames at Night.*] A screw steamship had just come out of the Regent's Canal Dock in the River Thames, about 2 a.m. on a December morning, when she came into collision with a dumb barge which was drifting up the river with the flood tide, and without having any light exhibited:—*Held*, that the steamship might, under the circumstances, have kept out of the way of the barge, and that she ought to have done so, and that she was alone to blame for the collision. The Owen Wallis (6370) - 175

DUPLEX QUERELÂ—*Pendency of Action of Quare Impedit—Concurrent Remedies—Election.*] A writ was issued out of the Court of Common Pleas, in an action of quare impedit, against the Bishop of Lincoln, at the suit of W., who claimed to be instituted to a living within the diocese of Lincoln, of which he was himself the patron. Whilst this action was proceeding W. instituted a suit of duplex querelâ in the Arches Court of Canterbury, calling upon the said bishop to shew cause why W. should not be instituted to the said living.—The Court, on motion on behalf of the bishop, directed that if W. did not elect to abandon the action of quare impedit within ten days, the suit of duplex querelâ should stand dis-

DUPLEX QUERELÂ—*continued.*
missed. See *Barton* v. *Ashton* (1 Lee, 460).
Walsh *v.* The Bishop of Lincoln - - 242

ECCLESIASTICAL LAW — Officiating without leave - - - - - 107
See Letters of Request.
—— Ornament - - - - 207
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—— Licence to officiate - - - 255
See Licence to officiate.
—— Rites and ceremonies - - 279, 390
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ELECTION OF REMEDY—Duplex querelâ 242
See Duplex Querelâ.

FACULTY—Alteration of church - - 221
See Faculty to alter Church.
—— Confirmatory—Practice - - 265
See Confirmatory Faculty.
—— Schoolhouse—Burial ground - - 294
See Faculty for Schoolhouse.

FACULTY FOR SCHOOLHOUSE — *Faculty for Erection of Schoolhouse on Burial Ground closed by Order in Council—16 & 17 Vict. c. 134—18 & 19 Vict. c. 128, s. 18.*] Under special circumstances a faculty may be granted for the erection of a school on a portion of a parish churchyard closed for burials by order in Council. In re Bettison [294

FACULTY TO ALTER CHURCH—*Alterations in Church—Faculty granted without the Consent of a Majority of Vestry.*] On an application for a faculty, to authorize alterations in a parish church, made on behalf of the vicar and one of the churchwardens of the parish, it appeared that although the major part of those parishioners who were members of the Church of England were in favour of the application, the majority of the vestry, composed principally of parishioners not members of the Church of England, was opposed to it. The Court, in granting a faculty to authorize some of the proposed alterations, held, that although it might be fairly influenced by the vote of the vestry in relation to alterations likely to affect the architectural appearance of the church or the convenience of the public, yet it was bound in matters connected with the comfort and convenience of those who attended the church to give greater weight to the opinion of the majority of those parishioners who were members of the Church of England. The Vicar and Churchwardens of Tottenham *v.* Venn - - 221

FOREIGN SOVEREIGN—Ship—Jurisdiction 59
See Admiralty Jurisdiction.
FORFEITURE OF SALVAGE - - 178
See Salvage, Forfeiture of. 1, 2.

FREIGHT—*Contract of Affreightment—Execution of the Contract on the Part of the Ship-owner—Inability to deliver Goods arising from the Incapacity of the Goods—Lien for Expenses incurred in preserving Cargo—The County Courts Admiralty Jurisdiction Amendment Act,* 1869 (32 & 33 *Vict. c.* 51), *s.* 2.] The defendant shipped on board the steamship of the plaintiff in the port of London a number of barrels of petroleum. A bill of lading was given for the goods: it provided that the goods should be delivered at the port of Havre, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, &c., excepted, unto orders or assigns on paying freight. It further provided that the goods should be taken out within twenty-four hours after arrival, or pay a fixed sum per day demurrage, and a note in the margin stated that the goods were subject to a landing charge of 5 per cent. on the amount of freight and primage. The defendant wrote to G., who was the ship's broker at Havre, informing him that the petroleum was to be sent to Rouen, and that he was not to deliver it without production of the bill of lading regularly indorsed, and that the freight and other expenses were to be charged on the goods. The vessel arrived in the harbour at Havre, on the night of the 7th of December, 1870, with the petroleum and other goods on board. Owing to there being at the time a large quantity of war material at Havre, the authorities there would not allow the petroleum to be landed, and would not allow the vessel to remain in the harbour with the petroleum on board. On the morning of the 7th of December the vessel sailed from Havre and proceeded to Honfleur and Trouville, but the authorities at those ports refusing to allow the petroleum to be landed, the vessel returned to Havre on the 12th of December, and in the outer harbour there transhipped the petroleum into a lighter hired on behalf of G. to receive it. The vessel then went into dock, and having discharged the rest of her cargo and shipped a fresh cargo for London, she was obliged by the authorities at Havre to re-ship the petroleum. On the 16th of December she sailed from Havre, and in due course she arrived at the port of London with the petroleum on board. G. was well aware of the various movements of the vessel. The bill of lading for the petroleum was not presented at Havre or elsewhere. The defendant had notice of the petroleum being brought back to London, but he did not take delivery of it. The plaintiff instituted a suit in rem against the petroleum:—*Held*, that the plaintiff was entitled to recover in such suit the bill of lading freight, and the expenses and demurrage incurred in respect of the petroleum at Havre, Honfleur, and Trouville, and freight for the carriage of the petroleum from Havre to London.—*Semble*, that there was an entire execution of the contract on the part of the plaintiff.—But even if there was not such entire execution, still he was entitled to recover the bill of lading freight, because there was such an execution of the contract as he could effect consistently with the incapacity of the cargo.—Where a master of a ship, in order to preserve cargo, takes measures such as a wise and prudent man would think most conducive to the benefit of all concerned, the cargo is subject to a lien for the expenses so incurred, and this lien may be enforced by a suit in rem, by virtue of the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869. Cargo ex Argos (6008) - - 13

—— Abandonment of ship - - - 269
See Salvage.

GOODS CARRIED INTO PORT—*Damage to Cargo—Port in England or Wales—The Admiralty Court*

GOODS CARRIED INTO PORT—*continued.*
Act, 1861 (24 *Vict. c.* 10), *s.* 6.] A foreign ship was chartered to load a cargo of rice at a port in the East Indies, and therewith proceed to Belle Isle, Scilly, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom or on the Continent between Havre and Hamburg. The vessel loaded her cargo and proceeded to the port of Falmouth, and there received orders to go to Bremen, where she discharged her cargo. It was alleged that the cargo had suffered damage in the vessel. After discharging her cargo, the ship sailed to Cardiff on a new voyage, and was there arrested in a suit instituted on behalf of the consignees of the cargo of rice under the 6th section of the Admiralty Court Act, 1861:—*Held*, that the cargo of rice was carried into a port in England within the meaning of the words in the 6th section of the Admiralty Court Act, 1861, and that the Court had jurisdiction to entertain the suit. The Pieve Superiore (6642) - 170

GRAVESTONE—*Inscription—Right of the Incumbent of a Parish to prohibit Erection of a Gravestone in the Parish Churchyard.*] A churchyard is the freehold of the incumbent, subject to the right of the parishioners to interment. The incumbent has a primâ facie right to prohibit altogether the placing of any gravestone in his churchyard, subject to the control of the ordinary. Where the incumbent has refused to allow a gravestone to be erected and application is made to the ordinary for a faculty for its erection, it is in the discretion of the ordinary to grant or refuse a faculty, and where the Bishop has expressed an adverse opinion to the gravestone, and his chancellor has refused a faculty the Court of appeal will not overrule the decision unless it is clear that the discretion vested in the ordinary has been improperly exercised. The daughter of H. K., a regularly appointed permanent minister of the Wesleyan denomination, was buried in the churchyard of the parish in which her father resided. The incumbent of the parish refused to allow a stone with an inscription describing the deceased as the daughter of the "Rev." H. K., "Wesleyan Minister," to be erected over the grave. H. K. then applied to the Bishop, and the Bishop replied by letter, and expressed an opinion that the title of reverend should not be allowed upon the stone. Formal application was then made to the chancellor of the diocese to issue the usual citation, in order to obtain a faculty for the erection of the stone, and after argument, he refused to do so. On appeal, the Dean of the Court of Arches, without pronouncing that the prefixing of the title "reverend" was illegal, affirmed the decision of the Court below. Keet *v.* Smith - - 398

HOLY COMMUNION—Refusal - - 463
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IMAGES—Church—Illegality. - - 297
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INCUMBENT—Inscription on gravestone - 398
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—— Officiating without licence - - 255
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INEVITABLE ACCIDENT—Right to begin - 132
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INSCRIPTION—Gravestone - - - 398
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INTEREST—Civil suit—Monition - - 135
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JURISDICTION—Admiralty—Booty - 436
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—— Admiralty—Damage to cargo - 386
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—— Admiralty—Damage to cargo - - 170
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—— Admiralty—Foreign sovereign - 59
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—— Admiralty—Title to ship - - 6
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—— County Court—Admiralty - - 157
See County Court Jurisdiction.

—— County Court—Admiralty - - 13
See Freight.

—— County Court—Bottomry - - 1
See Bottomry. 2.

KHEDIVE OF EGYPT—Sovereignty - 59
See Admiralty Jurisdiction.

LETTERS OF REQUEST—*Church Discipline Act* (3 & 4 *Vict. c.* 86), *ss.* 19–23—*Officiating without Leave—Offertory Alms—Suit in Form Criminal having the Effect of establishing Civil Right.*] A suit promoted by the vicar of the parish against a clerk in holy orders for officiating without leave in a chapel in such parish can only be carried on in the mode prescribed by the 23rd section of the Church Discipline Act.—Letters of request signed by the chancellor of the diocese calling upon the judge of the Arches Court to entertain such a suit held to be invalid. Richards *v.* Fincher. [107

LICENCE TO CLERK—*Officiating without Leave—Unconsecrated Chapel—Licence by Bishop with consent of deceased Incumbent*—1 & 2 *Vict. c.* 106, *s.* 95.] The bishop of a diocese granted a licence to a clerk in holy orders to officiate as minister in an unconsecrated proprietary chapel in a parish within the diocese; the licence was granted with the consent of the incumbent of the parish. Afterwards the bishop died, and the incumbent of the parish died, and the succeeding incumbent forbade the clerk to minister in the parish. The clerk insisted on his right to officiate in the said chapel, and the succeeding incumbent promoted criminal proceedings against the clerk under the Church Discipline Act, and prayed that he should be monished to abstain from officiating in the chapel:—*Held*, that the licence was invalid as against the promoter, and did not, under the circumstances, authorize the defendant to officiate in the chapel:—*Held*, that the clerk could not be considered as a curate, and was not entitled to the benefit of the provisions of the 95th section of 1 & 2 Vict. c. 106. Richards *v.* Fincher - 255

LIEN—Freight—Performance of contract - 13
See Freight.

LIEN FOR FREIGHT—Performance of contract
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LIFE SALVAGE - - - - 184
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LIGHT ON SHIP—Dumb barge - - 175
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—— Stern light - - - - 431
See Stern Light.

LIGHTER—*Damage—Appeal from County Court—Admission of Evidence—"Regulations for preventing Collisions at Sea—River Lighter not bound to carry Lights—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 26.] A lighter of sixty tons burthen was proceeding under sail in the river Thames, above Gravesend, at night, without any light being exhibited on board her, and came into collision with a steam vessel. In a suit instituted on behalf of the owners of the lighter to recover in respect of the damage done to the lighter by reason of the collision, it was proved that the lighter was ordinarily employed in the river, and was not a seagoing vessel:—*Held*, that the "Regulations for preventing Collisions at Sea" did not impose upon the lighter any obligation to carry any light, and that the lighter was not to blame for having no light. The C. S. Butler (6869) - - 238

LIGHTED CANDLES—Altar of church - 279
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LIGHTS—Collision—Lighter - - 238
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LORD'S SUPPER—*Refusal to administer the Holy Communion—Canons* 26 *and* 27—*Personality of the Devil—Punishment after Death—Church Discipline Act*, 3 & 4 *Vict. c.* 86.] A parishioner published a book of selections from the Old and New Testament, and designedly omitted therefrom passages relating to the personality of the devil and to the existence of punishment for sin after death.—In correspondence with the vicar of the parish he stated that the omitted passages were in their generally received sense in his opinion quite incompatible with religion or decency. The vicar, after seeking the advice of the bishop of the diocese, refused to administer the Sacrament of the Lord's Supper to the parishioner. The bishop of the diocese, when the vicar sought his advice, either gave no order or direction in the matter or gave an order or direction which was obeyed by the vicar:—*Held*, that the conduct of the vicar was not such as to render him a criminous clerk subject to the provisions of the Church Discipline Act.—*Semble*, that the parishioner was disqualified from receiving the Sacrament of the Lord's Supper. Jenkins *v.* Cook - - 463

MARSHALLING ASSETS—Ship - - 123
See Bottomry. 3.
MASTER OF VESSEL—Wages - - 123
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MASTER'S WAGES—Priority - - 123
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MERCHANT SHIPPING ACT, 1854, s. 191 - 191
See Counter Claim.
—— s. 458 - - - - - 184
See Salvage, Life.
MISTAKE IN VALUE—Salvage - - 380
See Salvage.

MONITION IN CIVIL SUIT—*Allegation of Interest.*] A monition calling upon the churchwardens of a parish to remove certain alleged unlawful ornaments in the parish church, or to appear and shew cause against such removal, must disclose on its face such an interest in the person at whose instance it issued as would have entitled him to institute and carry on a civil suit commenced in the ordinary way by citation, and must, therefore, contain an allegation that the party taking proceedings has the status of a parishioner of the parish. *Liddell* v. *Beal* (14 Moore P. C. 1) followed. Fagg *v.* Lee - - - - 135

MORTGAGE—Ship—Title - - - 6
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MORTGAGE OF SHIP—Title—Jurisdiction 6
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NECESSARIES—Ship—Bottomry—Merger 1
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NECESSARIES FOR SHIP—Bottomry—Merger - - - - - 1
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NEGLIGENCE—Collision—Towing ship - 226
See Negligence of Towing Ship.
—— Ship—Salvage - - - - 178
See Salvage, Forfeiture of.

NEGLIGENCE OF TOWING SHIP—*Damage—Ship in Tow of Steam Vessel—Duty to keep out of Way of Sailing Vessel—Regulations for preventing Collisions at Sea, Articles* 15, 19, 20—*Vessel towed liable for Negligence of towing Vessel.*] The steamship *A.* found at a foreign port the *S.*, a screw steamship, totally disabled in her machinery. Both vessels belonged to the same owners, and the *A.* took the *S.* in tow and towed her into the English Channel. Both vessels were upwards of 1000 tons net register, and owing to the disabled condition of the *S.* the towage was of a difficult character. Whilst the *A.* was proceeding with the *S.* in tow in the English Channel at night a collision occurred between the *A.* and a sailing-ship close hauled on the starboard tack. The damage done by the *A.* caused the sailing ship to sink, but before she sank the *S.* ranged up alongside of her and came into contact with her. The sailing vessel had seen on her starboard bow a light at the mast-head of the *A.* three or four miles off and had kept her course. Those on board the *A.* had seen the green light of the sailing ship about three quarters of a mile off and about four points on the port bow of the *A.*, and this was the first they had seen of the sailing ship: on this light being seen, or shortly after, the helm of the *A.* was put hard a-port. It was found as a fact that the *A.* had not a proper look out, and that the *A.*, if she had adopted proper measures in time, might have avoided the collision:—*Held*, that it was the duty of the *A.* to keep out of the way of the sailing ship, and that she was to blame for the collision:—*Held*, also, that the vessels *A.* and *S.* must be considered as both liable to be condemned in damages occasioned by the collision. The American and The Syria (6795, 6799, 6800) - - - - 226

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ORNAMENT—Church—Baldacchino - 207
See Baldacchino.
OUTPORT CHARGES—Notary - - 194
See Costs of Notary.

PARTICULARITY—Ecclesiastical pleading 390
See Book of Common Prayer.
PERILS OF THE SEAS—*Damage to Cargo—Dangers of the Seas—Bill of Lading.*] A shipowner signed bills of lading for the due delivery of cargo at the port of discharge, the dangers of the seas and fire only excepted:—*Held*, that the exceptions in the bill of lading did not operate to protect him from liability for damage done to the cargo by sea water, let into the hold in consequence of the barratrous act of the crew in boring holes in the ship during her voyage, for the purpose of scuttling her.—Difference between "dangers of the seas" in a bill of lading and in a policy of marine insurance.—*The Freedom* (Law Rep. 3 P. C. 594) commented on. The Chasca - 446
PERSONALITY OF THE DEVIL—Holy Communion - - - - - 463
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PILOTAGE, COMPULSORY - - 161, 187
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RIGHT TO BEGIN—*Practice—Collision—Duty of Steamship in Fog.*] In a damage suit the practice of the Court requires the plaintiff to begin, notwithstanding that the defendant raises no other defence than that of inevitable accident.—In a dense fog it is the duty of a steam-vessel to anchor as soon as circumstances will permit. A steam-vessel proceeding, though at a moderate speed, under steam in a dense fog, after she reached a proper anchorage ground, held to blame for so doing. The Otter (6543) - - - 203
2. —— *Damage—Inevitable Accident—Onus of Proof.*] In a cause of damage the defendants, by their pleading, made no charge of negligence against the plaintiffs, but denied generally the averments in the petition, and pleaded inevitable accident:—*Held*, that the plaintiffs ought to begin. *The Thomas Lea* (38 L. J. (Ad.) 37) overruled. The Benmore (6455) - - 132
RIGHT TO FREIGHT—Performance of contract
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SALVAGE—*Mistake in Value—Alteration of Decree.*] Salvage services having been rendered to a ship laden with cargo, a salvage suit was instituted against ship, freight, and cargo. Separate appearances were entered on behalf of the owner of the ship and the owner of the cargo. The owner of the cargo filed an affidavit of value stating the value of the cargo, and the owner of the ship filed an affidavit of value stating the value of the ship and freight. At the hearing, the Court, taking these values as accurate, by its decree awarded to the salvors a certain sum as salvage. Some time afterwards, the owner of the cargo discovered that he had by mistake included in his valuation of the cargo the value of the freight, and that the freight was of more value than appeared by the affidavit of value filed on behalf of the owner of the ship, and he made application

SALVAGE—*continued.*

to the Court to reduce the value of the cargo, and to reduce the amount it had previously decreed as salvage. On the mistake being proved:—*Held*, that the Court had power to correct the mistake and to make the necessary alterations in the decree. The James Armstrong (6810, 6813, 6833, 6835, 6874) - - - - 380

2. —— *Pleading — Right of Shipowner to Freight after Abandonment of Ship.*] A barque laden with a cargo shipped at Charleston under bills of lading whereby the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen, was run into in the English Channel and damaged by another vessel, which was alone to blame for the collision. The master and crew of the barque abandoned her, and in her abandoned state she was taken possession of by salvors, who brought the barque and her cargo into Dover. The cargo was damaged by sea-water, and was alleged to be deteriorating. In a suit instituted by some of the salvors against the barque, her cargo, and freight, the Court, on an application made on behalf of the plaintiffs without notice to the owners of the barque, ordered the cargo to be sold. The owners of the barque afterwards hearing of the order, and wishing to have the cargo transhipped and carried on to its destination, applied to the Court to rescind the order, and offered to give bail for the cargo. The Court being of opinion that it was for the benefit of all parties that the cargo should be sold, refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold, and the proceeds brought into Court, and the owners of the barque then applied to the Court to order the payment out of the proceeds in Court of a sum of money in respect of freight:—*Held*, that, by the abandonment of the barque, the contract to pay freight had been dissolved, and that the owners of the barque were not entitled to any payment in respect of freight. The Kathleen (6733, 6740, 6769) - - - - 269

3. —— *Pilotage.*] A Dutch barque was riding at anchor off Deal, and waiting to proceed down Channel, and a waterman who, though not a licensed pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7*s.* a day, with 5*l.* in addition, for navigating the vessel as pilot until she arrived off Beachy Head. The day after the waterman came on board, and whilst the barque was still at anchor, a gale came on, and the tempestuous state of the weather caused the vessel to drive, and rendered it necessary to slip the chain, when, under the direction of the waterman, the vessel was taken through the Gull Stream and brought up in safety in Margate Roads.—In a salvage suit instituted on behalf of the waterman and other persons who had rendered services to the vessel, the Court *held*, that the services rendered by the waterman were within the scope of his contract, and that he was not entitled to claim as a salvor. The Æolus (6069) [29

4. —— *Pleading.*] In a suit instituted on behalf of the owners, master, and crew of a steam tug, to recover salvage reward for salving a disabled vessel and her cargo, it appeared by the

SALVAGE—*continued.*

petition that persons other than the plaintiffs in the cause had assisted in the service, and in an article in the answer filed on behalf of the owners of the salved vessel and her cargo, the defendants alleged that they had been ordered by a Court of competent jurisdiction to pay to such other persons the sum of 240*l.* in respect of the assistance so rendered by them.—The plaintiffs moved to strike out this article. The Court holding that the article was relevant to the matters in issue in the suit, rejected the motion. The Antilope (6240) - - - - - 33

5. —— *Practice—Appeal from Cinque Port Commissioners—Tender—*1 *&* 2 *Geo.* 4, *c.* 76.] The sum of 800*l.* had been awarded by the Cinque Port Commissioners to salvors for services rendered to a brig and her cargo. The owners of the brig and cargo, pursuant to 1 & 2 Geo. 4, c. 76, instituted an appeal against this award in the Court of Admiralty, and afterwards tendered by act in Court the sum of 100*l.*:—*Held*, on motion to direct the notice of tender to be taken off the file, that the appellants were entitled to make such tender by act in Court, notwithstanding that no tender had been made prior to the institution of the appeal. The Annette (6303) - 9

6. —— *Apportionment—Services rendered by Transport—Award to Senior Naval Officer in Command in the Locality.*] The captain of a Queen's ship lying at anchor in a foreign port received intelligence that an English steamer was outside the port disabled, and in a position of great danger, and communicated with the master of a screw steamer which was under charter to the Lords of the Admiralty as a transport, and was then coaling in the port. In consequence of this communication the transport, after taking on board one officer and a party of petty officers and seamen from the Queen's ship, proceeded to the disabled vessel and succeeded in placing her in safety. As salvage remuneration for the services so rendered a sum of 1000*l.* was tendered and accepted in a cause of salvage instituted on behalf of the owners, master, and crew of the transport, and the captain, officers, and crew of the Queen's ship. On an application to apportion this sum:—The Court awarded 400*l.* to the owners, master, and crew of the transport, 400*l.* to the captain of the Queen's ship and the party of petty officers and seamen who went on board the transport, and 200*l.* to the officer who accompanied them. The Nile (6829 & 6884) [449

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—— Life - - - - - 184
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SALVAGE, FORFEITURE OF—*Damage—Right of salved Vessel to recover Damage caused by negligent Navigation of salving Vessel in rendering Assistance—Right to Salvage Remuneration not forfeited.*] A screw steamer fell in with a disabled barque in the English Channel, and in answer to signals of

SALVAGE, FORFEITURE OF—*continued.*

distress approached her to render assistance. In rendering salvage services to the barque damage was caused to that vessel by the negligent navigation of the screw steamer, the two vessels coming into collision on three occasions. To recover for the damages sustained in these collisions, the owners of the barque promoted a cause of damage against the steamer, and subsequently an action for the recovery of salvage remuneration was brought by the owners of the steamer against the barque. On the two causes coming on to be heard together, the Court *held*, that the owners of the barque were entitled to recover in the damage cause, and that the owners of the steamer were entitled to recover in the salvage cause. The C. S. Butler (6672). The Baltic (6728) 178

2. —— *Construction of s.* 450 *of the Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104).] The plaintiffs in a salvage suit claimed salvage for the following services:—they found a barge adrift in the river Thames, without any one on board of her, and they restored her to her owners:—*Held*, that the 450th section of the Merchant Shipping Act, 1854, did not apply, and that the neglect of the plaintiffs to deliver the barge to the receiver of wreck of the district did not operate as a forfeiture of their claim to salvage. The Zeta (7292) - - - - - - 460

SALVAGE, LIFE—*Persons belonging to Ship in distress—The Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104) *s.* 458.] A steam-vessel incurred serious damage by a collision, and her master ordered her boats to be got out. Some of her crew, without leave from the master, got into one of the boats and rowed away. The boat's crew were afterwards picked up at sea, and rescued from a position of danger, by a smack. In a salvage suit instituted on behalf of the owners and crew of the smack against the steamship: *Held*, that the plaintiffs were entitled to recover in such suit salvage for the service they had rendered. The Cairo (6687) - - - - - - 184

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See Booty of War.

SECURITY TO ANSWER JUDGMENT—*Ship—Damage—Principal Suit in Rem—Cross Suit in Personam—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 34. The steamship *B.* and the steamship *C.* came into collision in the Thames. Both sustained damage, and the *B.* sunk and became a total loss. The owners of the ships were foreigners residing abroad. A suit in rem was instituted against the *C.* by the owners of the *B.* A cross suit in personam was afterwards instituted by the owner of the *C.* against the *B.* On application made on behalf of the owner of the *C.* the Court ordered the proceedings in the case against the *C.* to be stayed until security had been given by the owners of the *B.* to answer judgment in the cause instituted against the owners of the *B.* The Charkieh (6200) - - - - 120

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STEAM FERRY-BOAT—*Collision—Duty of Steam-vessel in dense Fog.*] A steam ferry-boat started in a dense fog to cross a navigable river, those in charge of her having been informed that vessels were anchored in or near her track. The ferry-boat, although navigated with all ordinary care, ran into and damaged a ship at anchor:—*Held*, that the ferry-boat was to blame. The Lancashire. (L. 126) - - - - 198

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STEAM TUG—*Damage—Collision between Sailing Vessel and Steam Tug hove to with her Engines stopped—Regulations for preventing Collisions at Sea, Art.* 15.] In a case where a collision occurred between a sailing vessel and a steam tug hove to with her engines stopped:—*Held*, that it was the duty of the steam tug to have kept out of the way of the sailing vessel. The Jennie S. Barker (L. 198) - - - - 456

STERN LIGHT—*Regulations for preventing Collisions at Sea, Art.* 17—*No Obligation to exhibit any other than the Regulation Lights—Rejection of Evidence on mixed Question of Law and nautical Skill.*] In a case where a sailing vessel under way, with her regulation lights properly exhibited, was overtaken and run down by a steamer at night, it was held that no blame attached to the sailing vessel for not exhibiting a light over her stern. The Earl Spencer (7061) - 431

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